# 83 - 1246

No.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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LOUIS F. PEICK, ET AL.,

*Petitioners,*

*v.*

PENSION BENEFIT GUARANTY CORPORATION,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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## QUESTIONS PRESENTED.

1. a. In light of "the Supreme Court's revitalization of the contract clause" (article I, § 10), should the court of appeals have applied a heightened rather than a minimum scrutiny standard to a due process clause challenge to a federal statute (Multiemployer Pension Plan Amendments Act of 1980 (MPPAA)) which retrospectively, retroactively and severely impairs private contracts?

b. Whether MPPAA's complete withdrawal liability provisions violate the due process clause facially or as applied to petitioners because those provisions retrospectively, retroactively and severely impair core financial limitations in petitioners' contracts and for the first time expose contributing employers to unlimited financial liability to petitioner defined benefit pension plan.

2. a. Whether, contrary to the decision of the court below, contract rights are property rights protected by the takings clause of the fifth amendment.

b. Whether MPPAA's complete withdrawal liability provisions effectuate a taking by retrospectively and retroactively destroying the investment backed and core provisions of petitioners' contracts and for the first time exposing contributing employers to unlimited financial liability to petitioner defined benefit pension plan.

## TABLE OF CONTENTS

## Table of Authorities

*Cases:*

*Statutes and Regulations*

*Miscellaneous*

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Plaintiffs-appellants in the court below petition for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW.

The opinion of the court of appeals (App. A, *infra,* 1a-59a) is unofficially reported at 4 EBC (BNA) 2473. The opinion and order of the district court (App. C, *infra,* 1c-69c) are reported at 539 F. Supp. 1025.

## JURISDICTION.

The judgment of the court of appeals (App. B, *infra,* 1b) was entered on December 19, 1983. The jurisdiction of the Court is invoked under 28 USC 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions and statutes involved are set out in the appendix (App. E, *infra,* le-7e).

## STATEMENT.[1]

1. Petitioners are a large multiemployer defined benefit plan, its trustees, and its sponsoring multiemployer collective bargaining associations and labor organization representing the employees of the members of the employer associations.[2]

In 1954 bargaining between the Union and three of the Employer Associations representing trucking employers domiciled in the Chicago area produced a collective bargaining agreement which provided for the creation and funding of the 705 Plan. The defined benefit plan established by the trustees is funded solely by employers who are parties to collective bargaining agreements requiring contributions to the plan (App. A 13a). The initial and each subsequent contract between the Union and the Employer Associations set the rate of employer contributions to the 705 Plan.

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[1] The Statement presents to the Court facts contained in undisputed affidavits and exhibits submitted by petitioners to the district court and considered by the courts below. See, e.g., App. C 19c n. 26.

[2] Petitioners are the Local 705 International Brotherhood of Teamsters Pension Fund (705 Plan or plan); its board of trustees composed of Louis F. Peick, W.Eugene McCarron, John Navigato, Ralph Niedert, Sam Canino, M.J. Seiwert, Jr., Michael O'Grady and Frank Bridge (trustees); its sponsoring employer associations, Illinois Motor Truck Operators Association (IMTOA), Illinois Trucking Associations, Inc. (ITA), Cartage Exchange of Chicago, Inc. (CEC), and Motor Carriers Labor Advisory Council (MCLAC) (collectively Employer Associations); and its sponsoring labor organization, Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union). During the plan's 1979 fiscal year: Plan assets were $178.7 million at book and $174.7 million at market value. There were 1,279 employers contributing approximately $29.8 million, 15,733 active participants of whom 6,900 had a nonforfeitable right to a pension benefit, and 4,299 retired and terminated vested participants receiving payments of approximately $17.2 million (App. A 12a-13a; App. C 11c-12c).

The 705 Plan is administered by a board of trustees composed equally of employer trustees appointed by the Employer Associations and employee trustees appointed by the Union. The collective bargaining agreements and the trust agreements among the petitioners vest in the trustees exclusive and plenary authority to manage the trust and to formulate and administer the plan (App. A 13a). The employers' only contractual obligations are to make timely contributions to the plan in the amounts and under the conditions set out in the collective bargaining agreements (App. A 24a-25a & n.17).[3]

When the subject of a pension plan was discussed during the negotiations for the 1954 collective bargaining agreement, the Employer Associations stated a willingness to have the employers contribute to a pension plan as an inducement to the employees to remain with the employers until retirement age (then age 65). The Employer Associations insisted and the Union agreed that the employers' obligations to the pension plan be limited to making the negotiated contributions. The language in the 1954 Cartage Agreement was intended to carry out the parties' intent.

When the 705 Plan was formed, the Union trustees, the employer trustees, the Union, and the Employer Associations put language in the trust agreement (which was retained in each amended agreement) to again make it clear that the contributing employers' only liability to the 705 Plan, the employees, and the beneficiaries was the employers' payments to the 705 Plan of the collectively bargained contributions. As discussed in subsequent collective bargaining meetings and trustees meetings, the provisions in the respective agreements so restricting the employers' liability have been a primary reason that the employers agreed to increased contributions, and that the employer trustees voted initially to grant past service credits

[3] For the creation, nature and funding of the 705 Plan, *see generally Teamsters Local 705 v. Daniel*, 439 US 551 (1979).

to participating employees thereby creating an immediate unfunded liability, to thereafter increase the plan benefits, and to amortize the unfunded liability to the extent permitted by law (App. A 13a).

Since the plan's inception, a primary reason that the Union has been able to negotiate contracts with newly organized employers providing for contributions to the plan and with existing employers for increases in the amount of contributions has been the limitation on employer liability to the plan contained in the collective bargaining and trust agreements (App. A 13a).

When the Union and the Employer Associations negotiated increases in the employers' rate of contributions, the trustees generally improved the nature and amounts of benefits. These improvements increased the plan's unfunded vested benefit liability.[4] As of January 31, 1980 the unfunded vested benefit liability of the 705 Plan was $183.2 million (App. A 13a). From inception the 705 Plan has met or exceeded all funding, actuarial and eligibility standards required by the actuary and federal statutes and regulations.

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[4] A pension plan's unfunded vested benefit liability is the foundation for the liabilities imposed by the statute challenged in this case. 29 USC § 1381(b) (App. E 1e; App. A 11a-12a) According to the affidavit of the 705 Plan actuary filed in the district court:

> The determination of the unfunded vested benefit liability under the plan is equal to the excess of items (a) plus (b) over item (c) below:
>
> (a) The actuarial present value of expected future benefits due for all participants who are currently receiving monthly benefits; plus
>
> (b) The actuarial present value of expected future nonforfeitable benefits due for all active and terminated participants who are not currently receiving monthly benefits; less
>
> (c) The value of the plan assets.

The historical experience of the 705 Plan is that substantial numbers of employers cease contributing to the plan only to be replaced by an equal or greater number of participating employees. Over five plan years preceding this suit, over 600 employers stopped contributing to the plan and over 100 employers began contributing resulting in a stable number of participating employees (App. A 14a).

2. In 1974 Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC §§1001 *et seq.* Title IV of ERISA, 29 USC §§ 1301-1368 (1978 ed.), which is the focus of this case, defines the insurance coverage of pension benefits, delineates the procedures for plan termination, and defines employer liability. Respondent Pension Benefit Guaranty Corporation (PBGC) was established by ERISA as a federal corporation, 29 USC § 1302(a), to administer Title IV's insurance program; i.e., to insure the payment of certain pension benefits to participants in covered pension plans that terminate. Title IV's insurance program is self-financing. The PBGC's funds are generated primarily by the annual per capita premiums paid by insured parties. 29 USC §1307.

Title IV of ERISA treated covered multiemployer[5] pension plans differently from other covered plans. The PBGC was required to maintain separate trust funds for the payment of benefits to participants in multiemployer and other plans, 29 USC §1305, and the former paid a lower initial premium, 29

[5] Prior to amendment in 1980, ERISA defined a multiemployer plan differently than the normal usage. 29 USC § 1301(a)(3) (1978 ed.). As in ERISA as amended, "[t]he term multiemployer plan is used here in the traditional context to refer to a plan maintained pursuant to one or more collective bargaining agreements which cover the employees of two or more unaffiliated employers." H. Rep. No.96-869, Pt.1 53, 96th Cong., 2nd Sess. (1980), *reprinted in* [1980] U.S. Code Cong. & Ad. News 2921; 29 USC § 1301(a)(3) (Supp. V 1981).

USC §1306. The statutory liability for employers contributing to other than multiemployer plans was imposed by 29 USC §1362 which provided that employers who had pension plans covered by the PBGC insurance programs were liable to the PBGC for the insufficiency of their plans' assets at termination up to a maximum of thirty percent of the net worth of their corporate assets (App. A 3a-4a.)

Where a multiemployer plan continued in operation, a withdrawal liability was imposed on only a "substantial employer" who ceased contributing to the plan, but the liability abated if the plan did not terminate within five years from the date of withdrawal. 29 USC §1363. A "substantial employer" was an employer who, over a specified time, made at least ten percent of all employer contributions to the multiemployer plan. 29 USC § 1301(a)(2). Where a multiemployer plan terminated, each contributing employer and each substantial employer who had withdrawn within five years of plan termination was liable to the PBGC for its share of the unfunded vested liability, subject to the thirty percent maximum in §1362, to be applied separately to each employer (App. A 4a-5a). 29 USC §1364. Finally, a mandatory guarantee of plan benefits was effective on the date of enactment for most covered plans, but postponed to January 1, 1978 for multiemployer plans. 29 USC §1381(a)&(c)(1). The PBGC was granted discretion to guarantee benefits due from terminating multiemployer plans. 29 USC §1381(c)(2)-(4).

3. In 1980 Congress amended ERISA via the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208 (Sept. 26, 1980). MPPAA amended Title IV of ERISA, as relevant to our case, by replacing the limited liability of an employer for a terminated plan imposed by 29 USC §§1363 and 1364 with a continuing obligation on contributing employers to fund an active multiemployer plan (App. A 10a-11a). The new obligation is

referred to in MPPAA as complete withdrawal liability. 29 USC § 1383 (Supp. V 1981) (App. E 2e). Although MPPAA was signed into law on September 26, 1980, its liability provisions apply to employers who made a complete withdrawal[6] after April 28, 1980 (App. A 12a).[7] 29 USC § 1461 (e)(2)(A) (Supp. V 1981).

The 705 Plan determined that between April 29 and September 26, 1980 thirteen employers had ceased contributing to the plan, and that thereafter through December 31, 1980 nine more followed (App. A 14a).

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[6] In general, a complete withdrawal occurs when an employer permanently ceases to have an obligation to contribute under the plan or ceases all covered operations under the plan. 29 USC §1383(a) (Supp. V) (App. E 2e). Excluded from the definition of a complete withdrawal are employers who leave plans under circumstances which qualify under the so-called building and construction industry, entertainment industry, trucking industry, and sale of assets exemptions. 29 USC §§ 1383(b)-(d), 1384(a) (Supp. V) (App. E 2e-4e). A trucking industry plan is one where "substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehouse industry." 29 USC § 1383(d)(2) (Supp. V) (App. E 5e). According to a sponsor of the act, "substantially all" means "where at least 85 percent of the contributions to the plan are made by employers who are primarily engaged in the specified industries." 126 Cong. Rec. H7900 (remarks of Rep. Thompson). The 705 plan does not meet the "85 percent rule". The PBGC interprets the exemption to apply only to an employer who is "primarily engaged" in a specified industry and who withdraws from a qualified plan. A complete withdrawal from a trucking industry plan therefore occurs only where the PBGC determines that, as to the employer who withdraws and is primarily engaged in the industry, cessation of contributions has caused substantial damage to the plan's contribution base or the employer fails to furnish a bond or escrow for fifty percent of the withdrawal liability. 29 USC § 1383(d)(3)(B) (Supp. V) (App. E 5e).

[7] The period between April 29, 1980 and September 26, 1980, when MPPAA was signed into law, is referred to as the retrospective period (App. A 15a n.9).

MPPAA establishes a "de minimis" rule whereby the allocable unfunded vested liability of an employer who completely withdraws will be reduced by $50,000, less the amount, if any, by which the originally determined unfunded vested liability allocable to the employer exceeds $100,000. This is termed in MPPAA as the presumptive de minimis rule and becomes applicable unless and until a plan adopts a $100,000 rule. 29 USC § 1389 (Supp. V). The trustees of the 705 Plan have not opted for the higher deductible. The amounts not collected by reason of the application of the de minimis rule are allocated to all other employers in the following plan year based on the contribution ratios for the five preceding plan years. 29 USC § 1391 (Supp. V). The application of the presumptive de minimis rule means that eight of the twenty-two employers who ceased contributing have no complete withdrawal liability to the 705 Plan, and that their amounts of withdrawal liabilities are allocable in the following plan year to the contributing employers. The remaining fourteen employers should have been assessed by the trustees between $11,000 and $1.1 million dollars. As of January 31, 1980 the unfunded vested benefit liability of the 705 Plan for each employee of a contributing employer was $11,645.

Petitioners were deeply concerned that MPPAA had altered a material part of the collective bargaining and trust agreements, and that that alteration bodes ill for the future stability of the 705 Plan. Members of the Employer Associations had been seriously contemplating terminating their businesses. The Employer Associations were upset about the unbargained for liability which now applied to their members who had made or would make a complete withdrawal, and the contingent liability which, if material, must be disclosed in the financial statements of contributing employers (App. A 18a & n.12, 19a).

The trustees did not take any steps required of them by MPPAA to assess a withdrawal liability on the employers who

ceased contributions to the 705 Plan and were subject to assessment (App. A 18a n.12). Instead, they joined with the Union and the Employer Associations in filing this suit to declare unconstitutional MPPAA's withdrawal liability provisions.

4. In 1981 petitioners filed the first suit in the nation attacking the constitutionality of MPPAA's complete withdrawal liability provisions. Since then over one hundred suits have been filed[8] (App. A 24a; App. D).

Petitioners filed a complaint for declaratory judgment with affidavits and exhibits in the United States District Court for the Northern District of Illinois. The case was assigned to Judge Susan B. Getzendanner (the district court). Petitioners asked the district court for a declaration that MPPAA's complete withdrawal liability retrospectively and retroactively severely impaired the contractual limitations on the employers' obligations to the 705 Plan and thereby violated the due process and takings clauses of the fifth amendment. They also asserted that requiring arbitration of any disputed withdrawal liability assessment deprives the employers and trustees of rights guaranteed by the seventh amendment (App. A 1a).[9] The defendants in the suit were respondent PBGC and the Secretaries of Labor and of the Treasury whom, it was alleged, administer Title IV of ERISA as amended by MPPAA.

Defendants Secretaries of Labor and the Treasury filed motions to dismiss asserting that they were inappropriate

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[8] Petitioners have attached (App. D 1d-12d) a compilation of cases pending as of September 1, 1982 challenging the constitutionality of MPPAA's complete withdrawal provisions. The compilation was presented to the court below.

[9] Petitioners' complaint also asserted that the complete withdrawal liability was an *ex post facto* law proscribed by article I, § 9 (App. C 14c n.14). That challenge was decided adversely to petitioners by the district court (App. C 55c n.81), but not pressed by petitioners in the court of appeals.

parties defendant. Petitioners filed a motion for summary judgment based on the complaint and attached affidavits and exhibits. The PBGC filed a cross motion for summary judgment. The district court accepted *amici* briefs arguing that there is no article III case or controversy. (Two *amici* in the district court were *amici* in the court of appeals). The Employer Associations filed supplemental affidavits concerning their members who had ceased contributions to the plan during the retrospective and retroactive periods and members contributing to the plan who were seriously contemplating doing so, and from an expert and two major banks concerning the need for employers to disclose material contingent withdrawal liability on their financial statements.

On May 14, 1982 the district court filed a ninety page memorandum opinion and order. The district court began by finding that an article III case or controversy exists between the plan, the trustees and Employer Associations, but not the Union, on one hand, and the PBGC on the other (App. C 16c & n.20). On the merits the district court found that petitioners attack the facial constitutionality of MPPAA and raise complex and novel questions. It agreed with petitioners that MPPAA's complete withdrawal liability retrospectively and retroactively impairs core provisions in petitioners' contracts and have a substantive financial impact on the employers (App. C 24c-25c). The district court applied a minimum scrutiny standard to the challenged provisions (App. C 24c). Acknowledging that "[t]he ultimate questions are close," the district court concluded that "the challenged provisions of MPPAA survive facial attack" (App. C 1c; App. A 14a-16a). The district court denied petitioners' motion for summary judgment, granted "in its entirety" the PBGC's cross motion, and "dismissed" the case (App. C 68c, 69c).

Based on the rejection of the merits of petitioners' claims, the district court did not rule on the Secretaries' motions to

dismiss (App. C 13c n.13). Petitioners filed a motion pursuant to Federal Rules of Civil Procedure Rule 41(a)(2) to amend the judgment to dismiss without prejudice the Secretaries "to ensure that the May 14 order is a 'final decision' within the meaning of 28 USC § 1291. . . ." The district court entered the requested order (App. C 70c-71c).

5. The court of appeals did not disagree with the facts found by and affirmed the judgment and rationale of the district court. It decided 2-1 that a case or controversy exists between petitioners, except the Union, and respondent PBGC and that the prudential requirements for a present adjudication exist (App. A 16a-24a, 56a-59a). Although it "[did] not think that the case can properly be considered an 'as applied' challenge," the court below found no "need to pursue this question. . . since we do not think it has any bearing on our decision about the constitutionality of the MPPAA in the case before us" (App. A 23a n.16).

Turning to petitioners' constitutional challenges, the court of appeals first addressed petitioners' assertion that heightened scrutiny used in a contract clause (article I, § 10; App. E 1e) analysis is the appropriate test for this due process clause challenge. It acknowledged that petitioners' position finds support in decisions of the Sixth and Ninth Circuits and stated that "[w]hile a number of lower courts have touched on the relationship between the contract clause and the due process clause, there appears to, as yet, be no consensus emerging as to the proper role of the contract clause in due process analysis" (App. A 28a). It rejected what it considered to be an invitation to "take the rash step of erasing the lines of demarcation between these two fundamental, far-reaching and *distinct* constitutional provisions—certainly not without a much clearer directive on this subject from the ... Court[,] * * * [p]articularly given the state of uncertainty engendered by the . . . Court's recent revitalization of the contract clause. . ."

(App. A 29a-30a; fn. omitted). Instead, the court of appeals adopted the minimum scrutiny standard employed by the Court in *Usery* v. *Turner Elkhorn Mining Co.*, 428 US 1 (1976) (App. A 31a-32a), and by the court of appeals in *Nachman Corp.* v. *PBGC*, 592 F2d 947 (1979), *aff'd. on nonconstitutional grounds*, 446 US 359 (1980) (App. A 40a-41a, 42a).

After stating that it would not apply a heightened scrutiny contract clause analysis to petitioners' due process clause challenge, the court below nevertheless stated that "[t]o the extent that this heightened level of scrutiny approaches the type of analysis utilized in contract clause-based cases, we apply this analysis to the operation of the MPPAA in the retrospective period in the '*Nachman*' section of the opinion" (App. A 39a n.25). Using the factors and rationality enunciated in *Nachman*, the court of appeals rejected petitioners' due process clause challenge to MPPAA's retrospective and retroactive complete withdrawal liability provisions (App. A 50a).

The court of appeals rejected "[petitioners'] claim that the withdrawal liability provisions. . . also violate the fifth amendment proscription against the taking of private property for public use without just compensation" (App. A 50a; fn. omitted). It did not dispute petitioners' record-based assertion that the limitations on the employers' obligations to the plan were core contractual provisions creating investment backed expectations. Rather, the court below held that contract rights are not property rights protected by the takings clause (App. A 52a), and that therefore it "need not even reach the question of whether there was a 'taking' in this case" (App. A 53a).

The court of appeals rejected petitioners' remaining contentions that the complete withdrawal provisions are void for vagueness (App. A 53a-54a), and that "the mandatory arbitration provisions. . . infringe on constitutional rights such as 'liberty of contract,' 'access to the courts,' and 'the right to a jury trial' " (App. A 54a).

## REASONS FOR GRANTING THE WRIT.

The decision of the court below that heightened scrutiny under a contract clause analysis is not to be applied to a due process clause challenge to a federal statute which retrospectively, retroactively and severely impairs private contracts conflicts with holdings of other courts of appeal and of district courts. The court below acknowledged that the question is unsettled and that decisions of the Court have been read by inferior courts to support petitioners' analytical framework. This question presented for review is significant and its resolution essential in view of the hundreds of MPPAA challenges facing the federal courts. The application of a heightened scrutiny standard would have resulted in a decision that MPPAA's complete withdrawal liability provisions violate the due process clause given the fact that the district court, using a minimum scrutiny standard, held without disapproval by the court of appeals that "[t]he ultimate questions are close . . ." (App. C 1c).

The decision of the court below that contract rights are not property rights protected by the takings clause of the fifth amendment conflicts with decisions of the Court. MPPAA's severe impairment of petitioners' contracts is a taking proscribed by the takings clause given the statute's destruction of the investment backed contractual provisions limiting the liability of employers who contribute to the plan.

None of the cases presently before the Court presents these pivotal issues which are necessary to resolve a host of other MPPAA cases. The failure to grant the petition can result in furthering the unsettled state of the law and a waste of the Court's resources.

1. a. The court of appeals' holding that a due process clause challenge to a federal statute's severe impairment of private contracts is to be scrutinized under a minimum rather

than a contract clause heightened[10] scrutiny standard conflicts with holdings of other courts of appeals and district courts. *A-T-O, Inc.* v. *PBGC*, 634 F2d 1013, 1024 (6th Cir 1980); *Northwestern Nat'l Life Ins. Co.* v. *Tahoe Regional Planning Agency*, 632 F2d 104, 106 (9th Cir 1980) (App. A 28a); *Carbon Hill Health Care, Inc.* v. *Beasley*, 528 F.Supp. 421, 425 (MD AL 1981); *City of New Brunswick* v. *Borough of Milltown*, 519 F.Supp. 878, 883 (NJ 1981), *aff'd on other grounds* 686 F2d 120, 134 n.23 (3rd Cir. 1982), *cert. denied*, 103 S.Ct. 1184 (1983). The Court has not decided the question.

The court of appeals acknowledged that "there is no question that certain principles which have developed under the contract clause are applicable in due process analysis" (App. A 29a). It was not however prepared to apply heightened scrutiny to a due process clause challenge to the operation of MPPAA in the retroactive period "without a much clearer directive on this subject from the ... Court" (App. A 29a; fn. omitted), "[p]articularly given the state of uncertainty engendered by the ... Court's recent revitalization of the contract clause ..." (App. A 29a-30a). After having said this, the court below, without explanation for its patent inconsistency, professed to apply a contract clause-based heightened standard to the retrospective period (App. A 39a n.25)[11]

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[10] Petitioners use "heightened scrutiny" as a range of the level of scrutiny from beyond deferential and through strict scrutiny. Commentators have indicated that elements of a strict scrutiny standard are appropriate in a contract clause analysis. Note, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L.J. 1623, 1642 (1980); Note, 9 Seton Hall L. Rev. 784, 807 (1978).

[11] The conclusion is a *non sequitur* given the facts that the court of appeals continued to employ a rationality balancing test even in the retrospective period (App. A 42a-50a) and did not apply the mode of analysis deemed by the Court in *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234 (1978), to be appropriate to a contract clause analysis. See also n.10 *supra* & n.14 *infra*.

*(Footnote continued on following page.)*

To date the Court's directives on this subject are far from clear. The Ninth Circuit and the Seventh Circuit, according to the latter, read the same opinions of the Court[12] but reached different conclusions (App. A 29a n.22). The district court, in the present case, noted that "a comparison of two decisions written by Justice Holmes further supports the notion that federal and state laws should be tested against an identical

*(Footnote continued from preceding page.)*

In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), relied upon by the court below to use minimal scrutiny (App. A 31a-33a), the Court was not presented with and did not discuss the contract clause standard asserted here. In that case the federal defendants framed the question for review generally and the company expressed it solely in terms of a minimum scrutiny standard:

> 1. Whether Section 411(c)(3) of the Federal Coal Mine Health and Safety Act of 1969 *** is consistent with the Constitution.

Jurisdictional Statement [For Federal Defendants] at 2, No. 74-1302, O.T. 1974.

> 1. Do the provisions of the Coal Mine Health and Safety Act *** constitute an arbitrary and irrational legislative means for providing economic relief to financially distressed inactive miners and their families, in violation of rights guaranteed Appellants by the Due Process Clause of the Fifth Amendment of the Constitution?

Jurisdictional Statement [For Turner Elkhorn] at 3, No. 74-1316, O.T. 1974.

On the merits Turner Elkhorn argued only that the challenged portion of the act "is arbitrary, irrational and unfairly discriminatory legislation repugnant to coal mine operators' rights to due process of law and equal protection of law under the Fifth Amendment to the Constitution." Brief For Turner Elkhorn at 28-29. "Although [plaintiffs] concede that Congress has the power to establish a system of workers' compensation for miners, they contend that the Act is irrational and arbitrary." Brief for Federal Defendants at 18.

[12] *Thorpe* v. *Housing Authority of Durham*, 393 US 268 (1969); *Lynch* v. *United States*, 292 US 571 (1934); and *Perry* v. *United States*, 294 US 330 (1935) (App. A 29a n.22).

standard when they impair private contracts (App. C 24c n.31).[13] Commentators drew the conclusion that the Court considers a state's impairment of a private contract to face the same heightened scrutiny as does a state's impairment of its own contract whether challenged under the due process or the contract clause.[14] The court below held that whatever authority may have existed for the commentators' conclusion was dissipated by the Court's recent decision in *Energy Reserves Group, Inc.* v. *Kansas Power and Light Co.*, ____ US ____, 103 S.Ct. 697 (1983) (App. A 41a-42a).

In that case a majority of the Court held that a state's impairment of a private contract is to be reviewed under a deferential standard, quoting from *United States Trust Co.* v. *New Jersey*, 431 US 1, 22-23 (1977). 103 S.Ct. at 705. The Chief Justice, Justice Powell and Justice Rehnquist, concurring in the judgment, found it "unnecessary for the Court to address the question of whether, if there were an impairment of contractual rights, it would constitute a violation of the Contract Clause." *Id.* at 710.

A reading of the majority opinion in *Energy Reserves* that a state's impairment of a private contract is always measured by a minimal scrutiny standard under a contract clause analysis conflicts with the majority opinion in *Allied Structural Steel Co.* v. *Spannaus*, 438 US 234 (1978). *Allied Structural Steel* involved a contract clause challenge to a state's impairment of a contract to which the state was not a party. The three judge district court which heard the challenge upheld the state statute

[13] The cases decided by Justice Holmes and not mentioned by the court below are *Marcus Brown Co.* v. *Feldman*, 256 US 170 (1921); and *Block* v. *Hirsh*, 256 US 135 (1921).

[14] Schwartz, *Old Wine In Old Bottles? The Renaissance Of The Contract Clause*, 1979 Sup. Ct. Rev. 95; Note, *Revival of the Contract Clause*, 65 Va. L. Rev. 377 (1979) (App. A 30a). The cases analyzed are *Allied Structural Steel* v. *Spannaus*, 438 US 234 (1978), and *United States Trust Co.* v. *New Jersey*, 431 US 1 (1977).

using a deferential standard of analysis based, according to that court, on the teachings of *United States Trust Co. Fleck* v. *Spannaus*, 449 F.Supp. 644, 646, 648-651 (MN 1977). On direct appeal the Court did not apply a minimal scrutiny standard to the state pension statute as *United States Trust Co.* and *Energy Reserves* appear to dictate. Rather, after finding that the state statute had severely impaired the private contract, the Court announced a different and flexible standard: "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel* v. *Spannaus*, 438 US at 245, *quoted in Energy Reserves Group* v. *Kansas Power and Light*, 103 S.Ct. at 705. Under a contract clause analysis, the degree of deference to be accorded by a court to the legislative judgment is inversely proportional to the severity of the state's impairment of the private contract. *See Allied Structural Steel*, 438 US at 247, *quoting from United States Trust Co.*, 431 US at 23. The Court's decision in *Allied Structural Steel* can therefore be fairly read to have established a flexible standard of scrutiny stretching from deferential to heightened depending on the severity of the contractual impairment. To the extent that *Energy Reserves* announced a rigid minimal scrutiny standard, it conflicts with *Allied Structural Steel.*

If, however, *Energy Reserves* subscribes to the flexible standard set out in *Allied Structural Steel*—and its quotations from *Allied Structural Steel* and *United States Trust Co.* can be so read—then the court below clearly missed the signal and its decision in the present case conflicts with decisions of the Court. In the present case, the court of appeals did not disagree with the district court's holding that MPPAA's complete withdrawal provisions restrospectively, retroactively and severely impair a core provision of petitioners' contracts. Under *Energy Reserves* as harmonized with *Allied Structural Steel*, the severity of the impairment required the court below to apply a heightened scrutiny. It clearly did not do so.

Either there exists a tension between the decisions in *Allied Structural Steel* and *Energy Reserves* which only the Court can authoritatively resolve or the court of appeals erred in failing to apply a heightened scrutiny test to petitioners' challenge given the severity of the contractual impairment.

b. Both courts below had great difficulty in rejecting petitioners' due process clause challenge using a minimum scrutiny standard. If they had used a contract clause analysis, the challenged provisions would not have survived heightened scrutiny considering all that that standard requires.[15]

2. a. The two elements necessary to establish a violation of the takings clause of the fifth amendment are that the claimant must have a property right at stake, and that the government's conduct must sufficiently interfere with that property right so as to require compensation. The court of appeals held that petitioners had not satisfied the first element because contract rights are nonproperty[16] and thereby outside the ambit of the takings clause. It therefore did not reach the question whether there was a "taking" in this case.

The court below read seminal decisions of the Court interpreting the takings clause as not supporting petitioners' assertion that contract rights are property (App. A 51a-52a). However, one of the Court's cases conflicts with the decision of the court below and directly supports petitioners' position, and

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[15] See notes 10 & 14 *supra*. If the petition is granted, petitioners can demonstrate that the challenged statutory provisions cannot pass due process clause muster using a minimum scrutiny standard. This petition is not however the place to argue that question.

[16] In discussing the court of appeals' analysis of the takings clause, we use "nonproperty" to "distinguish between these interests and other types of interests that are characterized as 'property'. These distinctions carry substantive implications: the nonproperty interests get relatively less protection than do the property interests and their use may be restricted in ways that property interests are not." Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 Colum. L. Rev. 1545, 1570 (1982).

the other case is a touchstone for later pronouncements by the Court, ignored by the court below, that contract rights are a species of property protected by the takings clause.

The court below read *Pennsylvania Coal Co.* v. *Mahon*, 260 US 393 (1922), as deciding only that the takings clause was violated by a state statute's abolishment of an estate in the subterranean land retained by the coal company in its conveyance of the surface rights to a parcel of land (App. A 51a, 52a). It thereby ignored the facts critical for our purposes that the conveyance at issue had retained for the company an additional right to mine the subsurface coal, and that that contract right was unexercised at the time the statute was enacted. When the coal company brought an action for compensation the Court found that the company had indeed suffered a compensable taking which included the statute's noninvasive impairment of the company's unexercised contractual use-interest. *Id.* at 412, 413, 414.

In *Louisville Joint Stock Land Bank* v. *Radford*, 295 US 555 (1935) (App. A 51a, 52a), the issue before the Court relevant to the present case was whether the impairment of the liquidation value of a mortgagee's collateral in real property attributable to the exercise of powers conferred on the reorganization court by bankruptcy legislation violated the takings clause of the fifth amendment. *Id.* at 589. In striking down the legislation, the Court held that its vice was "the taking of substantive rights in specific property acquired by the [mortgagee] Bank prior to the Act." *Id.* at 590. On the one hand, *Radford* does not say that interests in real property are the only property rights which are protected by the takings clause, and on the other, *Radford's* rationale has been a basis for the Court's later holding that interests in other than real property are protected by the takings clause. *See Armstrong* v. *United States*, 364 US 40, 44 (1960).

The court of appeals wrote that the Court's "discussion of the takings clause" in *United States* v. *Security Industrial Bank*, ____ US ____, 103 S.Ct. 407 (1982), "clearly indicates that the Court continues to view this constitutional provision as offering no protection for 'contractual rights' as opposed to 'property rights' 103 S.Ct. at 411-12" (App. A 52a). It reached this conclusion by both attributing to the Court statements which it did not make and ignoring statements which it did.

According to the court of appeals, in *Security Industrial Bank* "[t]he Court stated that it thought the 'property right of the . . . creditor in the collateral' *was* 'quite different in legal contemplation' from the 'contractual right of [the same] secured creditor to obtain repayment of his debt' [103 S.Ct.] at 411" (App. A 52a; emphasis added). What the Court said, and the context in which it was said, are however quite different:

> [The government] argues that "bankruptcy principles do not support a sharp distinction between the rights of secured and unsecured creditors." Brief for the United States, at 31. However "bankruptcy principles" may speak to this question, our cases recognize, as did the common law, that the contractual right of a secured creditor to obtain repayment of his debt *may* be quite different in legal contemplation from the property right of the same creditor in the collateral.

103 S.Ct. at 411 (emphasis added). By changing "may" to "was" and by the juxtaposition of short phrases taken out of their context, the court below put in the Court's mouth a conclusion—that a contractual right is not property—which it had not stated. The court of appeals moreover ignored the Court's discussion of the persuasive effect to be given the characterization by state law of interests as property, *id.* at 411 & n.6, 412, and petitioners' assertion that interests in contracts are treated as property under Illinois for purposes of, *inter alia*, the takings clause. *See, e.g., Morton Grove Park District* v. *American Nat'l Bank*, 78 Ill2d 353, 362, 399 NE2d 1295, 1299 (1980).

Finally, the court of appeals' decision disregarded a number of occasions when the Court has explicitly stated that contractual rights are a species of property protected by the takings clause. *E.g., United States Trust Co.* v. *New Jersey,* 431 US at 20 n.16 ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."); *Lynch* v. *United States,* 292 US 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."); *Pennsylvania Coal Co.* v. *Mahon,* 260 US 393.

The decision of the court below conflicts with decisions of the Court on a vital and until now settled question of federal constitutional law. Despite the Court's explicit statements to the contrary, it now is the law in the Seventh Circuit that contract rights are nonproperty and outside the protection of the takings clause. Only by granting the petition for certiorari can this wrong of great constitutional dimension be remedied and the power vested in the Court to finally interpret and apply the Constitution of the United States be reasserted.

b. Neither the court of appeals nor the district court decided whether MPPAA's complete withdrawal liability provisions effectuated a taking. The challenged provisions nullify an express contractual right of contributing employers to immunity from liability to the plan beyond making the negotiated contributions so long as they are bound to the collective bargaining agreement. This right is obviously of great value to the employers in making business decisions including participation in and funding of the plan. Moreover, the exercise of the contractual right is profitable to the employers since over the years they have been free to use the balance of their money rather than keeping it available to pay for or in fact to pay substantial unbargained for liability to the plan. Assuming *arguendo* that the challenged provisions "substantially advance legitimate state interests," they nevertheless constitute a taking by "den[ying] an owner economically viable use of his [prop-

erty]." *Agins* v. *City of Tiburon*, 447 US 255, 260 (1980). In either event, the petition should be granted to remedy the proscribed taking of petitioners' property and to guide the courts in resolving a plethora of cases challenging MPPAA.

3. This case squarely presents for decision the question whether the retrospective and retroactive application of MPPAA's complete withdrawal liability violates the due process clause. Resolution of this and the other questions presented will settle significant constitutional issues in the more than one hundred suits challenging MPPAA which were filed after petitioners'. Moreover, none of the MPPAA cases pending before the Court presents all of these significant and recurring constitutional questions.

The Court has accepted an appeal by the PBGC from a decision of the Ninth Circuit that MPPAA's retrospective feature violates the due process clause. *Shelter Framing Corp.* v. *PBGC*, 705 F2d 1502 (1983), *prob. juris. noted sub nom. PBGC* v. *R. A. Gray & Co.*, 52 U.S.L.W. 3308 (Oct. 10, 1983) (Nos. 83-245, 83-291); *pet. for cert. filed sub nom. Carpenters Pension Trust* v. *Shelter Framing Corp.*, 52 U.S.L.W. 3268 (Oct. 4, 1983) (No. 83-507) (hereinafter collectively *R. A. Gray)*. The decision below in this case conflicts with *R. A. Gray* on the retrospective issue (App. A 37a n.24). *R. A. Gray* and other MPPAA cases "have simply ignored" the contract clause issue presented in this petition (App. A 28a). 705 F2d at 1510. Moreover, the Ninth Circuit did not decide the takings clause question because it had already held MPPAA's retrospective application of complete withdrawal liability to violate due process. *Id.* at 1515.

In *Republic Industries, Inc.* v. *Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F2d 628 (4th Cir 1983), *pet. for cert. pending*, No. 83-541, the court of appeals decided that MPPAA's retrospective provision is not violative of the due process clause using a rationality test. The Fourth Circuit "simply ignored" the contract clause issue (App. A 28a-29a)

which the district court held had not been raised. 534 F.Supp. 1340, 1350 (ED PA 1982). The Seventh Circuit indicated that its conclusion that MPPAA does not violate the takings clause may also have been reached by the Fourth Circuit (App. A 50a). However, the Fourth Circuit's discussion was insufficient to determine its rationale—e.g., whether it agreed with the court below on the threshhold as opposed to the "taking" element of a takings clause analysis—and, in any event, was clearly *dictum*. 718 F2d at 642-643; 534 F.Supp. at 1350 ("Plaintiff's argument that there is a 'taking' in violation of the Fifth Amendment's guarantee is grounded upon its assertion that it is required to insure the pension benefits to . . . members of the public which it, plaintiff, never employed").

A decision on the merits in cases before the Court without granting the petition in this case can result in a furthering of the unsettled state of MPPAA's constitutionality and a waste of the Court's resources as occurred recently.

In *United Parcel Service, Inc. v Mitchell*, 451 US 56 (1981), the Court was presented with a choice of state limitations statutes to be applied to an employee's breach of contract claim against the employer. The Court opted for the shorter state statute. The Court declined to decide whether the six-month limitation period in § 10(b) of the National Labor Relations Act should be the uniform standard because that question had not been presented by the parties and the suit had been filed beyond the six-month period. *Id.* at 60 n.2. Shortly thereafter the Court was again required to consider the limitations issue, this time in the context of an employee's additional claim of unfair representation by his union and a fully presented assertion that the Court should borrow from a federal limitations statute. *DelCostello v Teamsters Union*, ____ US ____, 103 S.Ct. 2281 (1983). Had *Mitchell* presented a timely federal statute-borrowing contention against the employer and the union, the Court could have resolved the package of issues at one time.

Only the petition in this case presents all of the issues concerning MPPAA's retrospective and retroactive application, the standard of scrutiny to be applied to a due process clause challenge to a federal statute that severely impairs private contracts, and the merits of the due process clause challenge. Moreover, only this case presents the question whether a contract is a property right protected by the takings clause and whether MPPAA's complete withdrawal provisions effectuate a taking of such property.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 1984

# APPENDICES

In the

# United States Court of Appeals

## For the Seventh Circuit

No. 82-2081

LOUIS F. PEICK, *et al.*,

*Plaintiffs-Appellants,*

*v.*

PENSION BENEFIT GUARANTY CORPORATION,

*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 81 C 1911—Susan Getzendanner, *Judge.*

ARGUED APRIL 13, 1983—DECIDED DECEMBER 19, 1983

Before CUDAHY and ESCHBACH, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge.*

CUDAHY, *Circuit Judge.* In this appeal, involving a suit seeking a declaratory judgment, we are asked to consider the constitutionality of the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA"). Specifically, we are called upon to decide issues concerning the justiciability of this case and whether the district court erred in upholding the withdrawal liability provisions of the MPPAA against challenges based on the due process clause, the takings clause, and several other constitutional provisions. The district court granted defendant Pension Benefit Guaranty Corporation's (the "PBGC") cross motion for summary judgment and dismissed the case,

thereby sustaining the constitutionality of the MPPAA. For the reasons detailed below, we affirm the district court in all respects.

I

*A. The Background of the MPPAA*[1]

The 1974 enactment of the Employee Retirement Income Security Act ("ERISA") marks the initial attempt by the federal government to regulate pension plans in a comprehensive manner.[2] This statute contains numerous provisions:

> Title I attacks the lack of adequate "vesting" provisions in many plans. Before ERISA, for example, if a plan did not provide for vesting until retirement, an employee with 30 years of service could lose all rights in his pension benefits in the event that his employment was terminated prior to retirement. Title I establishes minimum vesting standards to ensure that after a certain length of service an employee's benefit rights would not be conditioned upon remaining in the service of his employer. Employers were required to amend the terms of their plans to reflect these minimum standards effective January 1, 1976. [29 U.S.C.] § 1053(a)[(1976)]. A second area of difficulty was the inadequacy of the funding cycle used by many plans. To improve the fiscal soundness of these pension funds, Title II amends the Internal Revenue Code to require minimum funding. Title III imposes fiduciary responsibilities on the trustees of the pension funds and provides for greater information and disclosure to employee-participants. The

[1] This section is essentially adopted from Judge Getzendanner's well-reasoned and thorough opinion below. *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp 1025, 1029-34 (N.D. Ill. 1982).

[2] This is not to say that federal regulation was nonexistent prior to ERISA. *See* p. 44 *infra*.

> final area of concern addressed by ERISA was the loss of employee benefits which resulted from plan terminations. In order to protect an employee's interest in his accrued benefit rights when a plan failed or terminated with insufficient funds, Title IV establishes a system of termination insurance, effective September 2, 1974.

*Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 951 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980). The most relevant provision of ERISA for present purposes is the termination insurance program contained in Title IV. This program is run by the PBGC, a governmental entity which receives no direct federal appropriations. The PBGC relies instead primarily on premium payments: Under pre-MPPAA ERISA, multiemployer plans paid \$.50 per covered employee per year while single employer plans—those created, operated and maintained by a single employer acting alone—paid \$1.00 per covered employee per year to fund the PBGC. 29 U.S.C. § 1306 (1976).

Upon enactment of ERISA in 1974, the PBGC immediately insured the receipt of all "nonforfeitable benefits" that had been earned by employees in single employer plans.[3] A single employer that wished to terminate its plan was thus first required to notify the PBGC. 29 U.S.C. § 1341(a). If an investigation subsequently revealed that the plan lacked sufficient assets to pay its "nonforfeitable benefits," the PBGC itself became obligated for the shortfall. *Id.* at § 1341(b), (c). Any amounts so expended could be recovered from the terminating employer, *id.* at § 1362, but the latter's liability could in

[3] Actually, these guarantees were made effective as of June 30, 1974, a date prior to ERISA's enactment. 29 U.S.C. § 1381(b)(1976).

no event exceed thirty percent of its net worth. *Id.* at § 1362(b)(2).[4]

Multiemployer plan benefits were treated differently. They were not insured unconditionally upon enactment, but rather were guaranteed solely at the discretion of the PBGC until January 1, 1978. At that time, the guarantees were to become mandatory. *Id.* at § 1381(c)(1). In the interim, the PBGC was authorized to determine on a case-by-case basis whether it would pay a terminating plan's beneficiaries the difference between the value of their guaranteed benefits and the value of the plan's assets on the date of termination. *Id.* at § 1381(c)(2). As in the single employer context, secondary employer liability was imposed in all cases in which PBGC funds were actually expended. Specifically, all employers that contributed to a terminated multiemployer plan during the five years immediately preceding termination were collectively liable to the PBGC for the amount the latter had disbursed, each employer for its proportionate share of the total. As in the case of single employer plans, no individual employer's termination liability could exceed thirty per cent of its net worth. *Id.* at § 1364. Employers that withdrew from an on-going (*i.e.*, non-terminating) multiemployer plan thus incurred a contingent liability. It was contingent first upon the plan's terminating within the next five years, and second, in the absence of mandatory benefit insurance, upon the PBGC's deciding to insure the plan's benefits. ERISA did not, in general, obligate a withdrawing employer to provide the PBGC with any security for this potential obligation. An exception was recognized, however, in the case of a "substantial" employer, one that had contributed at least ten per cent of all contributions received by the plan over a specified period of time. *Id.* at § 1301(a)(2). Withdrawing employers meeting this de-

[4] Employers were in no event liable to the PBGC on account of terminations occurring prior to the date of ERISA's enactment. 29 U.S.C. § 1381(b)(1976).

scription were required to place in escrow an amount equaling what their termination liability would have been had the plan terminated on the date of withdrawal. *Id.* at § 1363(b). Alternatively the employer could furnish a bond. *Id.* at § 1363(c)(1). If no termination actually occurred during the next five years, the escrow was refunded or the bond cancelled. *Id.* at § 1363(c)(2).

There were several reasons why Congress chose not to insure all multiemployer plan benefits immediately in 1974. Congress viewed multiemployer plans as more stable and secure than single employer plans and thus saw less need to insure the former. *See Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729, 734 (9th Cir. 1978); 126 CONG. REC. 12,179 (1980) (remarks of Rep. Biaggi). Congress, moreover, was concerned about the potential costs of such a program. These worries became more prevalent as January 1, 1978 approached. Senator Javits warned his colleagues in late 1977 that he knew of several multiemployer plans which planned to terminate soon after the first of the year. *See id.* at S10099 (daily ed. July 29, 1980). Recognizing that it needed more time to study the entire problem, Congress delayed the effective date of the mandatory guarantee program and extended the PBGC's discretionary authority through June 30, 1979. Pub. L. No. 95-214, 91 Stat. 1501 (1977). At the same time Congress ordered the PBGC to prepare a comprehensive report analyzing the multiemployer situation.

The PBGC submitted its report on July 1, 1978. The major factual findings of the report were that:

> 1. There were about two thousand covered multiemployer pension plans with approximately eight million participants. Pension Benefit Guaranty Corporation, Multiemployer Study Required by P.L. 95-214, at 1, 20 (1978) (hereafter cited as PBGC Report).
>
> 2. About ten per cent of these plans were experiencing financial difficulties that could result in plan

terminations before 1988. These plans had about 1.3 million participants. *Id.* at 1, 138.

3. If all of these troubled plans were to terminate, it could cost the insurance system about $4.8 billion to fund all plan benefits then covered by Title IV's guarantee. The annual premium needed to fund this liability would be unacceptably high. *Id.* at 2, 16, 139.

4. Limiting consideration to only those covered multiemployer pension plans which were experiencing sufficiently serious financial difficulties that it was likely they would become insolvent before 1988, the cost to the insurance system to fund all guaranteed plan benefits could be approximately $560 million. The annual per capita premium needed to fund this liability could rise from fifty cents to as much as nine dollars. *Id.* at 2, 16, 140.

The PBGC derived these figures by using a computer model that analyzed and predicted the projected financial health of a selected sample of plans. The PBGC stressed that it relied solely on economic data and statistical analysis in forecasting the expected number of terminations. It did not attempt to factor in as well any incentives favoring termination which ERISA itself might provide. *Id.* at 137, Appendix XIV. Nevertheless the PBGC argued that such incentives were both present and troubling:

> Under the current statutory provisions, mandatory termination insurance for multiemployer plans would protect virtually all vested benefits in multiemployer plans, since the maximum guaranteeable benefit of $1,000 per month at age 65 is well above the average vested benefit level in multiemployer plans . . . .
>
> Since all, or nearly all, of the vested benefits of participants would be guaranteed upon termination under the current law, the cost of plan termination to participants would be greatly reduced. This does not necessarily mean that participants will have an incentive to bargain for plan termination merely to take advantage of the insurance program. However, the

removal of the threat of benefit losses does make termination a viable option to active employees in situations in which a high proportion of pension contributions is being used for the benefits of retirees.

The principal deterrent to plan termination under the current program is employer liability, which imposes a direct cost upon employers for termination, and an indirect cost on active employees since less money will be available for other labor costs. However, to assure that termination liabilities do not cause undue business hardship and loss of jobs, employer liability is limited to 30 percent of net worth. Because of this net worth limitation, employer liability may very well be less than the cost of maintaining the plan in some situations. Since the insurance program would cover most, if not all, of participants' vested benefits, it may be to the mutual advantage of the employers, the union, and the active employees to terminate the plan.

Other ERISA rules also may weaken a plan and result in eventual termination. The withdrawal rules may discourage large employers from entering multiemployer plans. The restrictions on benefit reductions contained in ERISA may cause a financially troubled plan to terminate, even though the benefits that would be paid if the plan terminated would be less (because of the guarantee limitations) than the benefits that would be paid if the plan were permitted to reduce its obligations to avoid termination. *Id.* at 23-24 (footnote omitted).

The PBGC analyzed in addition a number of ways ERISA could be amended. It examined proposals that would:

1. Require the PBGC to pay guaranteed benefits only when a multiemployer plan became insolvent, rather than simply terminated. *Id.* at 56, 57, 69, 70.
2. Reduce the level of benefits which were guaranteed. *Id.* at 56, 57.

3. Authorize the PBGC to provide financial assistance to multiemployer plans experiencing temporary financial problems. *Id.* at 56.
4. Permit multiemployer plans experiencing financial difficulties to reduce benefit payments. *Id.* at 40.
5. Require faster funding of multiemployer plan obligations. *Id.* at 56.
6. Increase the premiums paid by multiemployer plans. *Id.* at 18, 137-63.
7. Impose upon a withdrawing employer a fixed liability equal to that employer's share of the plan's unfunded vested liability. *Id.* at 40, 57.

On February 27, 1979, the PBGC submitted a legislative proposal incorporating some of these ideas. This was followed on May 3, 1979, by the formal introduction in both houses of Congress of the legislation which ultimately became MPPAA. Because of the scope of the bill, Congress once again delayed the effective date of the 1974 mandatory guarantee program, this time until May 1, 1980. Pub. L. No. 96-24, 93 Stat. 70 (1979).

The House Education and Labor Committee favorably reported MPPAA on April 3, 1980. The Committee specifically agreed with the PBGC's assessment of the 1974 Act:

> Under the existing termination insurance rules, guarantees are provided by the PBGC to participants in a terminated plan. Guarantee levels are high enough to result in coverage of virtually 100 percent of the vested benefits of participants in certain multiemployer plans. Employers who withdraw from a multiemployer plan more than five years before termination have no further obligation to fund the liabilities of the plan, while employers who remain with a plan until it terminates, or withdraw within five years of termination are liable to PBGC for unfunded guaranteed benefits up to 30 percent of net worth.

> In the case of a financially troubled plan, termination liability creates an additional incentive for employers to withdraw early. In such a plan, contribution increases may be escalating so sharply that termination liability may prove cheaper than continuing the plan. The remaining employers have an incentive to terminate the plan. Where active employees determine that benefits may be provided for them at considerably less cost than current contributions and are satisfied that vested benefits for retirees and others are virtually 100 percent covered by the guarantees, there is an incentive for the union to agree to terminate the plan. The result is to transfer the cost of providing benefits to the insurance system. The current termination insurance provisions of ERISA thus threaten the survival of multiemployer plans by exacerbating the problems of financially weak plans and encouraging employer withdrawals from and termination of plans in financial distress.

H.R. Rep. No. 96-869, Part I, 96th Cong., 2d Sess. 54-55, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2918, 2922-23 (hereinafter cited as *Education and Labor Report*); *accord*, *id.* at 60-61, *reprinted in id.* at 2928-29. The House Ways and Means Committee expressed similar views in its report released April 23, 1980. *See* H.R. Rep. No. 96-869, Part II, 96th Cong., 2d Sess. 15 *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3004 (hereinafter cited as *Ways and Means Report*). On April 30, 1980, Congress for a third time delayed the implementation of the 1974 mandatory guarantees. This extension lasted until July 1, 1980. Pub. L. No. 96-239, 94 Stat. 341 (1980). Finally, on May 22, 1980, the House approved MPPAA by a vote of 374-0. 126 CONG. REC. 12,233-34 (1980).

Senate approval followed on July 29, 1980, but only after yet another extension—to August 1, 1980—of the PBGC's discretionary authority under the 1974 law. Pub. L. No. 96-293, 94 Stat. 610 (1980). The Senate vote in favor of MPPAA was 85-1. 126 CONG. REC. S10169 (daily ed. July 29, 1980). Differences between the House and

Senate versions were eventually reconciled in September of 1980[5] and President Carter's approval followed soon thereafter on the 26th of that month.[6]

The MPPAA effected a variety of major changes in ERISA. Under MPPAA, the PBGC is required to guarantee certain pension benefits of covered multiemployer plans. The level of benefits guaranteed by the PBGC under the MPPAA is lower than the level guaranteed prior to the passage of the MPPAA. The premiums employers must pay the PBGC for insurance are significantly higher under MPPAA. The PBGC is also authorized to provide financial assistance to plans which cannot meet their current financial obligations. This permits a plan which is having financial difficulties to continue, and allows employers to continue making contributions to an insolvent plan without incurring liability under ERISA. Under the MPPAA, the insurable event for a plan is its insolvency, rather than its termination. The MPPAA further provides that the plan benefits are to be funded over a shorter period of time than formerly required and requires arbitration to resolve a wide variety of disputes between trustees and employers.

For purposes of this appeal what is most significant is that on September 26, 1980, the rules governing an employer's withdrawal from an on-going multiemployer

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[5] The House repassed its version 363-0 on August 26, 1980. 126 CONG. REC. H7909 (daily ed.). The Senate approved a slightly different bill the same day. *Id.* at S11676 (daily ed.) A conference followed, with the Senate and House agreeing to the conference report on September 18 and September 19 respectively. *Id.* at S12901 (daily ed.); *Id.* at H9180 (daily ed.) (vote of 324-1).

[6] A proposal to extend the PBGC's discretionary authority a fifth time failed on August 1. 126 CONG. REC. H6984 (daily ed.). The 1974 mandatory program was thus ultimately in effect for less than two months, from August 1, 1980 to September 26, 1980, the date President Carter approved MPPAA.

pension plan changed. No longer did such an event give rise, as it had under ERISA, to a contingent liability payable to the PBGC. Under MPPAA, an employer who withdraws must immediately begin to pay a fixed and certain debt owed to the plan.[7]

The details of this "withdrawal liability" are extremely complex. To obtain a basic grasp, it is important to realize that MPPAA regulates multiemployer plans of the "Taft-Hartley" variety. These plans are in reality trusts created by collective bargaining between a union and several employers. By law, the union appoints half the fund's trustees, and the employers appoint the other half. 29 U.S.C. § 186(c)(5)(B) (Supp. V 1981). The trust is funded by employer contributions which are made at a rate established by the terms of the collective bargaining contract. *Id.* This rate is usually expressed as an amount per time worked or product produced, *e.g.*, $.75 per hour or $1.50 per widget. The trustees collect the contributions and then determine, after considering all the constraints imposed by the contract and all applicable actuarial data, the level of benefits which can prudently be offered. All decisions as to benefits are within the sole province of the trustees. As a general rule, once an employer parts with its contribution, it retains no rights thereafter to determine how that money should be applied. *But cf. Borden, Inc. v. United Dairy Workers Pen. Program*, 517 F. Supp. 1162 (E.D. Mich. 1981).

A plan's vested liability is the actuarial present value of the benefit obligations which have vested.[8] The difference between this amount and the value of the plan's assets is called its unfunded vested liability. Under

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[7] MPPAA also provides for liability in certain cases of "partial withdrawal." *See* 29 U.S.C. §§ 1381, 1385 (Supp. V 1981).

[8] An employee's right to collect a pension benefit is "vested" when it survives a pre-retirement termination of employment. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 363-64, (1980).

MPPAA, a withdrawing employer becomes liable on the date of withdrawal for a proportionate share of the latter figure. *Id.* at § 1382. The trustees have substantial discretion in deciding how much to assess any given employer or employers. Thus, the statute lists several different methods of allocating a plan's unfunded vested liability, and it further empowers the trustees to seek PBGC approval of a completely different method of their own design. *Id.* at § 1391. Under the "presumptive" method of section 1391(b), the liability is derived basically by multiplying the plan's aggregate unfunded vested liability by a fraction the numerator of which is the sum of all contributions required to have been made by the withdrawing employer during the previous five years. The denominator is the sum of all contributions made by all the employers during this same period. If disputes between an employer and the trustees arise over an assessment, they are to be resolved, at least initially, in arbitration. *Id.* at § 1401.

One final aspect of MPPAA is highly relevant to this case. Though its provisions take effect in general upon enactment, the withdrawal liability rules are expressly made retroactive to April 29, 1980. *Id.* at § 1461(e)(2)(A). Any employer that withdrew after this date and before MPPAA's enactment is thus liable on the same basis as those who left after the September 26, 1980 enactment date.

*B. The Parties*

Suit was brought here by a number of parties involved with the Local 705 International Brotherhood of Teamsters Pension Fund (the "705 Fund"), a multiemployer pension trust organized in Illinois and created pursuant to collective bargaining agreements between a variety of employers and employer associations and Teamsters Local 705. Plaintiffs-appellants include the 705 Fund itself; the eight trustees of the Fund; Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 705"); and four employer organizations, the Illinois Motor Truck Operators Association (the "IMTOA"), the Illinois Trucking

Associations, Inc. (the "ITA"), the Cartage Exchange of Chicago, Inc. (the "CEC"), and the Motor Carriers Labor Advisory Council (the "MCLAC"), which are all non-profit corporations which represent and engage in collective bargaining for member companies (collectively, the "Employer Associations or Organizations"). The IMTOA, ITA and CEC negotiated the original agreement establishing the 705 Fund, and the MCLAC became a party to the Trust Agreement in 1975. Local 705 appoints the employee trustees of the 705 Fund and the Employer Organizations appoint the employer trustees of the 705 Fund. The defendant-appellee PBGC is charged with implementing and enforcing Title IV of ERISA as amended by the MPPAA.

The 705 Fund was created through collective bargaining in 1954 and is now apparently one of the larger multiemployer plans in the country. The 705 Fund is funded solely by employers who are parties to collective bargaining agreements. The appellants allege that the provisions in the collective bargaining and trust agreements which limit the employers' obligations to the 705 Fund to making a negotiated contribution to the Fund have been instrumental in encouraging the employers to increase their contributions, in bringing about an increase in the plan benefits and in encouraging negotiation of contracts with respect to newly organized employers.

As of January of 1980, 15,733 workers were employed by 1,279 employers contributing to the 705 Fund. 6,900 of those workers had a nonforfeitable right to a pension benefit and approximately 4,300 additional participants had vested pension rights even though they were no longer employed by a contributing employer. On January 31, 1980, the 705 Fund owned assets having a market value of $174.7 million and had vested liabilities of $357.9 million, leaving a funding deficit of $183.2 million. During the fiscal year ending January 1980, the Fund collected $29.8 million through contributions, earned $13.6 million more on investments and disbursed $17.2 million in benefit payments. In 1981, each participating employer contributed $51 per week per employee.

Historically, there has been some fluctuation in membership in the plan. During the five year period preceding January 1980, over 600 employers left the 705 Fund and more than 100 other companies joined. The number of active employees participating in the plan remained almost precisely uniform over this same period.

Appellants allege that between April 29, 1980 (the date when the withdrawal liability provisions of MPPAA first took effect) and September 26, 1980 (the date the MPPAA was signed into law), thirteen employers ceased contributing to the 705 Fund. Nine additional employers are alleged to have also ceased contributing between September 26, 1980 and December 31, 1980. The Employer Organizations further allege that some of their members have been seriously contemplating terminating their businesses. Because the contingent liability resulting from withdrawal must in all probability be disclosed in an employer's financial statements (thus presumably affecting its credit standing), these organizations and their members allege that the existence and operation of the MPPAA's allegedly unconstitutional provisions constitute a substantial injury to them.

The Trustees have not taken any of the steps required under the MPPAA to assess a withdrawal liability against the employers who have ceased contributing to the 705 Fund. The Trustees have instead joined with the 705 Local and the Employer Organizations in seeking a declaratory judgment that the withdrawal liability provisions of the MPPAA are unconstitutional.

*C. This Litigation*

The district court first addressed the contentions of various *amici curiae* both that the plaintiffs in the case did not have constitutional standing to seek a declaratory judgment and that the case was insufficiently "ripe" for adjudication. The district court rejected the *amici's* arguments, finding that the Employer Associations had standing to contest the MPPAA on the basis of the actual liability which certain of their members had incurred

under the Act due to their withdrawal from the 705 Fund, and on the basis of the injury suffered by all employer members who were forced to disclose their potential liabilities under the MPPAA in their public financial statements. The district court also rejected certain ripeness arguments, holding that because the case before it was a "facial" challenge to the validity of the MPPAA, the inadequacies of the factual record before the court were irrelevant.

The district court then turned to the substantive arguments before it. The court first considered the question whether the imposition of withdrawal liability upon an employer which had, prior to enactment, entered into an enforceable contract which apparently protected it from that type of liability violated due process. The court applied the framework of analysis developed by this court in *Nachman*, and found that no due process violation had been shown and that the Act was "rational" within the meaning of *Nachman*. The district court found that the MPPAA withstood both a rational basis analysis and the heightened scrutiny of contract clause analysis, and thus avoided a decision as to which mode of analysis was proper in this case. While stating that it was "an extremely close call," the district court also upheld the imposition of withdrawal liability upon employers which had withdrawn during the 150 day period between April 29, 1980, the date the withdrawal liability provisions were made effective, and September 26, 1980, the date President Carter signed the MPPAA into law.[9]

The court also rejected an equal-protection-based argument that the MPPAA irrationally imposed greater burdens on multiemployer plan businesses than on employers having their own plans, finding that Congress acted rationally despite its differing treatment of similarly situated entities. Plaintiffs' contentions that the MPPAA was

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[9] Following the lead of the district court, we shall refer to this period as the "retrospective period."

unconstitutionally vague and that the mandatory arbitration required under the Act violated the plaintiffs' seventh amendment right to a jury trial were similarly rejected by the district court.

## II
## JUSTICIABILITY

Before we turn to the appellants' constitutional challenges to the statute, we must first address whether this case both presents a "case or controversy" within the meaning of Article III of the U.S. Constitution and is "ripe" for adjudication. Various *amici curiae* argued in the district court, and have renewed their arguments in this court, that there is no justiciable controversy because the plaintiffs have not challenged the validity of any acts of the defendant, the PBGC.[10] The amici also argue that this case is not "ripe," or within prudential limits on the adjudication of constitutional issues, because it is "abstract," lacks a complete factual record and has parties whose interests may not be "truly adverse."[11]

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[10] The amici contesting the issue of justiciability are all parties to other lawsuits contesting the constitutionality of the MPPAA.

[11] The dissent, in the resolution of the justiciability issues presented here, gives insufficient weight to the stark adverseness of the parties. The PBGC has strenuously rejected the claim of unconstitutionality of the MPPAA, and has even sought and received a declaratory judgment on the merits of this claim in the district court. Appellants, on the other hand, have vigorously challenged the constitutionality of the MPPAA. While adverseness does not conclusively establish justiciability, it is important in evaluating whether the interests of the judicial process, as embodied in Article III's case or controversy requirement, are served by hearing the case on the merits. *See United States v. Johnson*, 319 U.S. 302, 305 (1943).

The fact that the PBGC sought summary judgment on the merits declaring the MPPAA constitutional supports our conclusion that this action fulfills Article III's case or controversy

(Footnote continued on following page)

The Supreme Court has characterized the question of justiciability in an action under the Declaratory Judgment Act, 28 U.S.C. § 2201, as being one of "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). *See also J.N.S., Inc. v. Indiana*, 712 F.2d 303, 305 (7th Cir. 1983). This is essentially the same standard as that provided by the basic constitutional minima of standing which the Supreme Court has repeatedly articulated, namely, that a party must show a "distinct and palpable injury" which is "fairly traceable" to the conduct or statute being challenged. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72 (1978); *Planned Parenthood Association v. Kempiners*, 700 F.2d 1115, 1118-23 (7th Cir. 1983) (Cudahy, J., concurring). The question whether a challenge to the constitutionality of a statute is of sufficient immediacy and reality to permit a declaratory judgment is necessarily one of degree. *See* 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2757 (1983).

We think it clear that the district court was correct in concluding that the Trustees of the 705 Fund, the Fund itself and the Employer Organizations have all suffered and asserted sufficient harm and real or threatened injury to bring themselves within the class of parties

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[11] *continued*

requirement. A suit *brought* by the PBGC against the trustees for a declaration that MPPAA is constitutional (and that the trustees must therefore assess withdrawal liability) would unquestionably present a justiciable controversy. By seeking judgment below, the PBGC effectively turned this into just such a case. In light of the posture of these parties, the fact that the appellants initiated the action is a mere technical consideration, which should not affect justiciability.

which has standing to contest the constitutionality of the Act. All of these parties have "legal interests of sufficient immediacy and reality" to justify their standing in this case. In fact, the testing of the constitutionality of the MPPAA in the present context seems an almost classically appropriate application of the Declaratory Judgment Act.

The Employer Associations are organizations whose membership includes employers which have *actually* withdrawn from the 705 Fund, both during the retrospective period created by the MPPAA and after the MPPAA was enacted on September 26, 1980, and are thus liable for withdrawal liability if the 705 Fund acts in accordance with the statutory mandate of the MPPAA.[12] Actual injury was also suffered by employer members which

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[12] The district court found that such member-employers did, in fact, exist and were current members of the Employer Associations. 539 F. Supp. at 1036 n.19. We have no reason to question these factual findings and they have not been challenged by any of the parties or the *amici*. This is not a case, therefore, where determination of a statutory question—whether a withdrawal has in fact occurred—could obviate decision on the constitutional issues. *See Transport Motor Express, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, No. 83-2026 (7th Cir. Dec. 19, 1983).

The dissent does not appreciate the practical realities of this litigation. The trustees of the fund here recognized that the MPPAA requires them to assess withdrawal liability against the withdrawn employers. The trustees, believing the statute unconstitutional and potentially harmful to the fund, have elected to bring this action before assessing liability against the employers. The district court found that the employers were liable under the terms of the MPPAA. Thus, the employers seek a declaration which would effectively prevent the fund and the PBGC from assessing liability. This appears to be precisely the situation for which the Declaratory Judgment Act was designed, and, contrary to the dissent's contentions, this application of the Act is constitutional.

were seriously contemplating withdrawal from the plan and which would have to disclose their potential liabilities on their financial statements, thus affecting their credit ratings.[13] We find that the Employer Associations have standing to challenge the MPPAA as representatives of the interests of their membership.

The Supreme Court has stated that: "It is clear that an organization whose members are injured may represent these members in a proceeding for judicial review." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *Warth v. Seldin*, 422 U.S. 490 (1975). This recognition of "associational" standing does not obviate the constitutional requirements of a case or controversy, however; the association seeking to represent its membership in a suit must still "allege that its members, or any one of them, are suffering immediate or threatened injury of the sort that would make out a justiciable case had the members themselves brought suit." *Warth*, 422 U.S. at 511; *Rockford League of Women Voters v. United States Nuclear Regulatory Commission*, 679 F.2d 1218, 1221-22 (7th Cir. 1982). Associational standing is particularly appropriate when the association is seeking to represent interests which are central to the purpose of the organization, *see* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531 at 214 (1975), and where the relief sought is some form of prospective remedy, such as a declaratory judgment, which will inure to the benefit of the organization's membership. *Warth*, 422 U.S. at 515.

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[13] Nothing in the dissent persuades us that the district court erred by accepting the uncontroverted affidavits which spell out the effect of this contingent liability on the financial status of the employers. The affidavits of two financial experts establish that the contingent liability injures the employers. A favorable judgment in this case would relieve these employers of the burden of carrying this contingent liability on their books and would allow them to stop contributing to the fund without incurring withdrawal liability. We see nothing "abstract" or "illusory" in this injury or in the relief a favorable judgment would afford. *See Duke Power*, 438 U.S. at 75, n.20.

Associational standing is fully appropriate in this case. The Employer Associations negotiated the original agreement establishing the 705 Fund, have the power to appoint the employer trustees of the 705 Fund and continue to be the entities responsible for overseeing the employers' interests with respect to the 705 Fund. This involvement with the 705 Fund is a major facet of the Employer Associations' activities. Moreover, the role of the Employer Associations in this suit parallels the role which those entities have played with respect to the individual employers' relationship with the 705 Fund. As the entities responsible for ultimately overseeing the employers' interests with respect to the Fund, it is entirely fitting that these entities should represent the employers in this challenge to federal legislation affecting the 705 Fund.

We also believe that the district court correctly found that the eight individual trustees of the 705 Fund and the 705 Fund itself had standing in this case. The trustees and the 705 Fund are statutorily obligated to assess withdrawal liability from employers who withdraw from the Fund. 29 U.S.C. §§ 1382, 1399 (Supp. V 1981). These appellants have chosen not to comply with their apparent statutory obligation. They therefore face remedial efforts instituted by the PBGC and are thus in a position where they are directly concerned with the issue of the MPPAA's constitutionality.[14]

[14] The dissent fails to appreciate the predicament in which the trustees find themselves. The MPPAA requires them to take action which they believe would harm the fund and would be unconstitutional. The PBGC has elected, according to its brief, to await the outcome of this case before instituting an action to compel the trustees to assess withdrawal liability. Further, the trustees, as fiduciaries, face potential personal liability if they act contrary to the interests of the fund. 29 U.S.C. § 1109. The Declaratory Judgment Act was adopted to relieve litigants of the choice between acting illegally and causing harm to themselves or others, at least where there is a colorable claim for relief. The injuries suffered by the trustees are thus ideally suited for redress in a declaratory judgment action.

We agree with the district court's conclusion that Local 705's assertion of injury is too speculative to justify standing for Local 705. Local 705 argues that it has been injured in that its collective bargaining agreement has been altered by the MPPAA's withdrawal liability provisions, and thus the time and resources spent to negotiate its collective bargaining agreement have been wasted. We agree with the district court that any harm to, or interference with, the Local's bargaining agreement attributable to the MPPAA is rather conjectural or attenuated; while it is true that the withdrawal liability provisions might ultimately alter or harm the Union's bargaining position, this possibility is simply too remote to base standing upon at this time.

The *amici* also assert that the PBGC is not an appropriate defendant because the PBGC did not "cause" the injury suffered by the plaintiffs and because the entry of judgment against the PBGC could not prevent or cure the injury identified. Entry of judgment against the PBGC would deprive the PBGC of its ability to require the trustees of the 705 Fund to assess, and the members of the Employer Organizations to pay, withdrawal liability. Since this suit is, at core, an effort to avoid the imposition and payment of this liability, a decision for the appellants would eliminate the very real threat that the PBGC will seek to require the appellants to satisfy their respective obligations under the MPPAA. Thus, entry of judgment against the PBGC would cure precisely the injury asserted: Because the appellants appear to have chosen to disregard the apparent statutory mandate of the MPPAA, the only threat to the status quo lies in the PBGC's ability to require the appellants to follow the MPPAA. If the PBGC is prevented from doing this by a decision of this court, the appellants are freed from all possible threat of injury caused by the MPPAA. Therefore, the PBGC is certainly an appropriate defendant in this challenge to the constitutionality of the MPPAA.

There is also no credible argument that the PBGC is not an interested party in this dispute. The PBGC is the government agency which is ultimately responsible for administering and enforcing the MPPAA. The PBGC promulgates all regulations needed to implement the statute and, most importantly, has the power to bring civil actions to enforce all provisions of the MPPAA. The PBGC, in fact, stated in the district court that it was "very likely" that it would take such action if needed.

The related issue of ripeness is also argued by the appellants. Ripeness is a doctrine which courts use to enforce prudential limitations upon their jurisdiction.[15] The doctrine has been stated as having two major aspects, requiring a court to "evaluate" both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S. Ct. 1713, 1720 (1983); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). In the declaratory judgment context, the Court has stated that:

> The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.

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[15] The precise source of the ripeness doctrine is a matter which courts have largely ignored and commentators are in disagreement about. It is unclear to what extent the ripeness doctrine is derived from the "case or controversy" requirement of Article III and to what extent it is a judicially created tool for avoiding decisions in cases which a particular court may feel lack an "optimal" factual setting. *See* D. CURRIE, FEDERAL COURTS CASES AND MATERIALS, 90-103 (2d ed. 1975); P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 145-46 (2d ed. 1973); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3532, at 240 (1975).

*Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 244 (1952). The Court has also stated that: "'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.'" *Pacific Gas*, 103 S. Ct. at 1721, *quoting Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1975).

We find this case ripe for adjudication. The issues presented by the case in its present posture are fully "fit" for our decision. There is no doubt that more issues involving the actual operation of the MPPAA would be before us if the parties had not initiated this suit until liability had been assessed, contested and arbitrated, but the potential existence of a different or more multifaceted case in the future cannot relieve us of the obligation to decide the case before us now. The district court characterized its decision as one deciding a "facial challenge" to the statute. Whatever characterization is given to the type of case before us,[16] we think that sufficient facts are presented to allow us to consider the core issue of the constitutionality of the withdrawal liability provisions of the MPPAA, at least as that issue affects the situation before us. This legal issue is one the resolution of which would be essentially unaffected by further factual development.

Unlike most of the cases involving challenges to the MPPAA, there is no pending or prematurely terminated liability proceeding in this case, raising substantial non-

[16] The parties have argued vigorously as to whether this is an "as applied" or "facial" challenge to the Act. Given the minimal or nonexistent record with respect to the actual operation of the MPPAA in the situation presented in this case, we do not think that the case can properly be considered an "as applied" challenge. *See Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc.*, 452 U.S. 264, 297 (1981). We do not need to pursue this question, however, since we do not think it has any bearing on our decision about the constitutionality of the MPPAA in the case before us.

constitutional issues which might be required to be resolved before reaching constitutional issues. *See, e.g., Transport Motor Express, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, No. 83-2026 (7th Cir. Dec. 19, 1983). The appellants here have chosen to raise an immediate challenge by suit against the PBGC rather than to await challenge by an employer in the context of a liability proceeding. While we in no way approve or disapprove of the strategic merits of this course of action, it is clear that there is no way for this particular case to reach a "fitter" stage.

This is also a case where substantial hardship would result if the court were to defer an opinion addressed to the key constitutional issues until another case should come along. The parties will all be vitally affected, in one way or another, by our decision. The nature of each party's injury in this case, *see* pp. 18-20 *supra*, is such that our decision is the only means of clarifying significant financial uncertainties. There are, moreover, literally hundreds of cases now pending in courts around the country which raise issues similar to those in the case before us. The progress of those cases, and judicial economy in general, may be materially enhanced by a ruling from this court.

We therefore find that this case is properly before the court. The appellants, except for local 705, have standing to contest the constitutionality of the MPPAA and the case is ripe for adjudication.

## III
## CONSTITUTIONALITY

The core issue presented by this case is whether Congress was within the bounds of its constitutional power when it enacted the withdrawal liability provisions which are at the heart of the MPPAA. The issue arises because of the MPPAA's impact upon private contractual arrangements which were already in existence at the time the MPPAA was enacted. The appellants argue that the Act impairs the collective bargaining and trust

agreements, entered into prior to April 28, 1980, which do not impose upon an employer pension liability going beyond a negotiated contribution to the 705 Fund.[17] The precise question raised is whether employers who withdraw from multiemployer pension plans after September 26, 1980, may constitutionally be subjected to the withdrawal liability imposed by the MPPAA if the employer was party to an enforceable contract which ostensibly did not include this type of liability.[18]

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[17] The appellants allege that under the 705 Fund's trust agreement, the employers' "only obligations [to the 705 Fund] are to make timely contributions to the plan in the amounts and under the conditions set out in the collective bargaining agreement." The appellants rely upon Article 14 of the trust agreement for this. This provision of the trust agreement reads:

ARTICLE 14

Miscellaneous

> *Section 1.* In no event shall an Employer, directly or indirectly, receive any refunds of contributions made to the Trust, except in case of bona fide mistake, and as to which contributions are returned within one year after payment of the contributions, nor directly or indirectly participate in the disposition of the Trust Fund or receive any benefits from the Trust Fund. Upon transfer to the Trustees, all responsibilities of the Employers for each contribution shall cease, and the Employers shall have no responsibilities for the acts of the Trustees. No employee shall have any individual right, title, interest or claim against Employer, Employer's contribution, or the Trust Fund, except as may be expressly provided for in this Agreement or under federal law.

[18] The case before us, because it involves both employers who withdrew from the 705 Fund during the retrospective period and employers who withdrew after September 26, 1980, actually involves two, somewhat distinct, levels of analysis. We first address the constitutionality of the MPPAA with respect to

(Footnote continued on following page)

*A. Due Process Analysis*

We must initially decide the question of what constitutional standard governs federal legislation having an impact (after enactment) on existing contractual arrangements. The starting point for this analysis is the due process clause of the fifth amendment.[19] Any "due process analysis properly begins with a discussion of the appropriate standard of review." *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 82 (1978). Appellants, and several of the *amici curiae*, argue that the due process clause is essentially coextensive with the contract clause[20] and thus that we should analyze this case in terms of the contract clause principles enunciated in such recent Supreme Court cases as *Energy Reserves Group v. Kansas Power and Light Co.*, 103 S. Ct. 697 (1983), *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) and *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). Appellee rejects this theory and argues that we must instead utilize the more deferential traditional standard of due process review applied in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

This court's opinion in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), a challenge to the constitutionality of provisions in ERISA imposing retroactive liability for the payment of unfunded vested pension benefits upon the termination of single employer pension plans, does not resolve this question. In *Nachman*, the court acknowledged that the question

[18] *continued*

employers who withdrew after September 26, 1980, because, in our view, if the Act were unconstitutional with respect to this group, it would necessarily be unconstitutional with respect to employers who withdrew in the retrospective period.

[19] "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U. S. Const. amend. V.

[20] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." U. S. Const. art. 1, § 10.

whether the due process clause and the contract clause in fact imposed identical restraints on the legislative impairment of contracts was subject to dispute. The *Nachman* court did not attempt to decide the issue, however, because it found that the challenged legislation in that case survived the heightened scrutiny of the contract clause, which necessarily meant that the legislation would also survive the more deferential test of the due process clause.

We find that the legislation before us is properly scrutinized under the traditional analysis of the due process clause and that the contract clause is only indirectly relevant to the present case. The contract clause, on its face, applies only to laws passed by *States*. Historically, it appears that the clause was intended to prevent the various States from enacting debtor relief measures which unfairly interfered with the ability of creditors to collect debts during the economic depression which followed the Revolutionary War. *See Spannaus*, 438 U.S. at 256-57 (Brennan, J., dissenting); B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 4-8 (1938). While it is clear that the contract clause has been applied in modern times to many areas other than "debtor relief" laws, it is also true that no Supreme Court case has yet held, or even suggested, that the contract clause is directly applicable to legislation of the *federal* government. *See Thorpe v. Housing Authority*, 393 U.S. 268, 278 n.31 (1969). *See also United States Trust Co.*, 431 U.S. at 17 n.13 (indicating some differences between contract clause and fourteenth amendment due process clause analysis); *Duke Power Co.*, 438 U.S. at 83 (contrasting the due process clause test of "arbitrariness or irrationality" with the "elevated" or "intermediate" standard of the *United States Trust* contract clause case); *In re Gifford*, 688 F.2d 447, 457 (7th Cir. 1982) (en banc) (stating "that the federal government may freely impair" contract rights) (the holding of *Gifford*, but not the reasoning on this point, was effectively rejected by *United States v. Security Industrial Bank*, 103 S. Ct. 407 (1983)).

While a number of lower courts have touched on the relationship between the contract clause and the due process clause, there appears to, as yet, be no consensus emerging as to the proper role of the contract clause in due process analysis. Aside from *Nachman*, this court appears to have essentially ignored the contract clause when considering fifth amendment due process-based challenges to federal economic or social welfare legislation. *See, e.g., In re Gifford*, 688 F.2d 447, 457 (7th Cir. 1982) (en banc); *Brach v. Amoco Oil Co.*, 677 F.2d 1213 (7th Cir. 1982). The Sixth Circuit, in *A-T-O, Inc. v. Pension Benefit Guaranty Corp.*, 634 F.2d 1013 (6th Cir. 1980), has indicated that it finds the contract clause applicable to a challenge to federal legislation only "to the extent that . . . contract clause principles may be incorporated into the Fifth Amendment" and has not specified that "extent." 634 F.2d at 1024 (citing *Nachman*). The Ninth Circuit, in *Northwestern National Life Insurance Co. v. Tahoe Regional Planning Agency*, 632 F.2d 104 (9th Cir. 1980), has gone slightly beyond this tentative linkage and held that "the Fifth Amendment's due process clause provides essentially the same restraint against federal impairment of the obligation of contracts" as the contract clause. 632 F.2d at 106 (citing *Thorpe*; *Lynch v. United States*, 292 U.S. 571, 579 (1934); and *Perry v. United States*, 294 U.S. 330, 350-54 (1935)). The majority of the-cases dealing with the constitutionality of the MPPAA have simply ignored this issue, choosing instead to follow the *Nachman* analysis and thus avoiding the problem. *See, e.g., Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502 (9th Cir. 1983);[21]

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[21] *Prob. juris. noted sub nom. Pension Benefit Guaranty Corp. v. R.A. Gray & Co.* and *Oregon-Washington Carpenters-Employers Pension Trust Fund v. R.A. Gray & Co.*, 52 U.S.L.W. 3308 (U.S. Oct. 18, 1983) (Nos. 83-245, 83-291); *pet. for cert. filed sub nom. Carpenters Pension Trust v. Shelter Framing Corp.*, 52 U.S.L.W. 3268 (U.S. Oct. 4, 1983) (No. 83-507).

*Republic Industries Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, No. 83-1054 (4th Cir., Sept. 9, 1983).

Our review of due process clause and the contract clause jurisprudence convinces us that these two constitutional provisions are by no means coextensive and rightly must be considered distinct. While there is no question that certain principles which have developed under the contract clause are applicable in due process analysis, we may not simply take the rash step of erasing the lines of demarcation between these two fundamental, far-reaching and *distinct* constitutional provisions—certainly not without a much clearer directive on this subject from the Supreme Court.[22] A wholesale and uncritical application of the contract clause to federal legislation would presumably result in a fundamental alteration of the role which the federal judiciary has played in the review of federal social welfare and economic legislation. Partic-

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[22] The Ninth Circuit in *Northwestern National Life Insurance* relied on *Thorpe v. Housing Authority*, 393 U.S. 268 (1969), *Lynch v. United States*, 292 U.S. 571 (1934), and *Perry v. United States*, 294 U.S. 330 (1935). Our reading of these cases does not yield the conclusion reached by the Ninth Circuit. *Thorpe*, *Lynch* and *Perry* all involve situations where the United States itself was one of the contracting parties. These cases concern the special circumstance of the federal government's taking legislative action which impairs a contract to which it is a party. These cases cannot be utilized to draw out a general principle which is equally applicable to federal legislation affecting contracts between two private parties.

This court's decision in *Nachman* is not to the contrary. The court explained that it was unnecessary to decide whether contract clause scrutiny applied to federal legislation because the statute before it withstood such heightened scrutiny anyway. 592 F.2d at 959. The court reasoned that since the legislation withstood the more stringent of the two possible levels of scrutiny there was no reason to decide which level was appropriate. *Id.*

ularly given the state of uncertainty engendered by the Supreme Court's recent revitalization of the contract clause, *see* Note, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L. Rev. 1623 (1980); Note, *Revival of the Contract Clause*, 65 Va. L. Rev. 377 (1979), we decline to take the course which appellants and *amici* urge upon us.

This is not to say that contract clause principles have no validity whatever in the context of a challenge to federal legislation. Particularly when the United States is seeking to impair a contract to which it is a party, the mode of analysis under the due process clause apparently closely parallels contract clause principles. *See, e.g., Lynch v. United States*, 292 U.S. 571, 579 (1934); *Perry v. United States*, 294 U.S. 330, 350-54 (1935). In the context of federal legislation affecting private contractual relationships, however, we think that contract clause principles must be much more diffidently applied. The role of the federal courts is to ensure that Congress acts within its constitutional bounds, not to substitute their own judgment for Congress' as to the fairest solution to a social problem. The danger of heightened scrutiny, and the reason it has been as sparingly applied since its heyday in the *Lochner* era,[23] is that it can easily mask the imposition by a court of a philosophical and economic straightjacket on the legislature. Any level of judicial scrutiny beyond that of a traditional means-ends rationality analysis is thus dubiously applicable to regulatory legislation. Hence, these higher levels of scrutiny are at present normally applied only in narrow categories of cases such as controversies involving "fundamental" rights or where judicial supervision is required to prevent a distortion of regular democratic processes. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The case before us, involving legislative action in the field of national economic and social policy where Con-

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[23] *Lochner v. New York*, 198 U.S. 45 (1905).

gress has traditionally been accorded wide discretion, does not merit or require the imposition of heightened scrutiny. We therefore find that the constitutionality of the MPPAA must be considered under the traditional "arbitrary and irrational" due process analysis of *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

In *Turner Elkhorn Mining* a group of coal mine operators brought suit to test the constitutionality of federal legislation requiring the operators to pay benefits for the death or disability of miners due to pneumoconiosis. The coal mine operators contended that the legislation violated the due process clause of the fifth amendment because it required them to compensate former employees who had left their employ before the legislation was passed. The operators apparently did not contest the imposition of such liability upon them for current and future employees. The Court stated:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.
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> * * *
>
> [O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

428 U.S. at 15-16 (citations omitted). The Court upheld the legislation as a rational measure to "spread the costs of the employees' disabilities to those who have profited." *Id.* at 18.

The Court in *Turner Elkhorn Mining* followed longstanding precedent. In such cases as *Calhoun v. Massie*, 253 U.S. 170 (1920); *Lichter v. United States*, 334 U.S. 742 (1948), and *Norman v. Baltimore & Ohio Railroad*

*Co.*, 294 U.S. 240 (1935), the Court consistently applied the principle that: "Contracts, however express, cannot fetter the constitutional authority of the Congress." *Norman*, 294 U.S. at 307. This court, in *Brach*, also recognized this fundamental principle that: "'So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it.'" *Brach*, 677 F.2d at 1224, *quoting F.H.A. v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958).

But the Court in *Turner Elkhorn Mining* also noted that "[i]t does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively." 428 U.S. at 16. In cases where the legislation in question has retroactive effect, special care must be taken in applying the "arbitrary and irrational" test to determine if there was indeed justification for the added burden which retroactive legislation imposes on those it regulates. In *Turner Elkhorn Mining*, the Court in no way indicated some special distaste for retroactive legislation, but merely stated that not only must legislation as a whole be rational and non-arbitrary but also that any retroactive aspects of the legislation must, in particular, be rationally and non-arbitrarily related to legislative goals.

One *amicus curiae* argues here that *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935), is more closely analogous to the case before us than *Turner Elkhorn Mining*. In *Alton Railroad*, the Court held that the compulsory retirement and pension system created by Congress to cover workers in the railroad industry was unconstitutional. The Court found several provisions of the legislation to violate the due process clause, including a provision that required railroads to pay pensions to individuals whose employment had ended prior to enactment of the statute and who had not at that time been entitled to pensions. For several reasons, we find *Alton Railroad* to be unpersuasive with respect to the case before us. First, it is unclear whether *Alton Railroad* retains any

vitality after *Turner Elkhorn Mining.* While the Court in *Turner Elkhorn Mining* purported to distinguish that case from *Alton Railroad* on the basis that the benefits in *Turner Elkhorn Mining* addressed "specific needs created by the dangerous conditions" of mining employment, this does not conclusively settle the issue. The Court's method of analysis in *Turner Elkhorn Mining* represents a fundamental shift from that employed in *Alton Railroad.* Not only did the Court explicitly question the continued vitality of *Alton Railroad*'s due process analysis, 428 U.S. at 19, but it also employed a mode of analysis substantially more deferential to legislative action than that employed in *Alton Railroad.* The case before us is also factually distinguishable from *Alton Railroad.* As we noted in *Nachman,* in *Alton Railroad* the employer had never agreed to pay any retirement benefits at all. *Nachman,* 592 F.2d at 962. In the case before us, on the other hand, the employers had previously agreed to fund pension benefits, albeit in a lesser amount than the requirements imposed by the MPPAA.

Applying the principles developed in *Turner Elkhorn Mining* to the MPPAA, it is clear that the withdrawal liability provisions of the Act survive due process scrutiny. Since the enactment of ERISA in 1974, Congress has recognized the special problems posed by multiemployer pension plans. Congress, and the administrative agency created by Congress to administer federal action in the area, spent several years extensively studying these problems. Because there is no indication that Congress' chosen solution, the withdrawal liability provisions of the MPPAA, are either irrational or arbitrary solutions to the problems identified, we hold that these provisions are constitutionally sound.

Congress' study of multiemployer pension plans revealed that the financial stability of these plans was threatened by the funding patterns under which the plans operated. A multiemployer plan whose future pension commitments have been only partially funded by employer contributions—including the contributions of with-

drawn employers—would have to look to some source of funding to make up for any deficiency attributable to the withdrawn employer. In the absence of imposition of withdrawal liability or, conceivably, a contribution from general tax revenues, this deficiency would in normal course become the responsibility of employers remaining in the plan. The PBGC study of the problem indicated that the obvious risk of added burdens upon employers who remained as participants in plans might induce more of them to remove themselves from multiemployer plans. This process could discourage the entry of new plan participants and precipitate the financial failure of less stable plans. Congress agreed with this analysis, expressly finding that:

> withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor management relations . . . .

29 U.S.C. § 1001(a)(4)(A) (Supp. V 1981).

After extensive hearings and consideration of the problem, Congress chose a solution which placed the initial burden of sustaining plan stability on withdrawing employers. The imposition of withdrawal liability upon employers who are leaving plans was chosen as the most effective measure both to reduce an employer's incentives to withdraw from a multiemployer plan and to offset the burden otherwise shifted to the remaining employers when a withdrawal nevertheless occurs. The basic question is whether this response to the present or potential financial problems of multiemployer plans is irrational. If, at the time of withdrawal of a participating employer, the current value of fund assets falls short of the vested benefit liability, is it fair to assess the withdrawing employer with its aliquot share of the deficiency?

First, one may ask whether this calculation of the deficiency in value of the assets is a meaningful basis for

requiring from *any* source a contribution to the fund. One may argue that this deficiency may in due course disappear through appreciation in value of the fund assets. Or it may be reduced in time by a flood of new employee participants as to whom employer contributions will be required without a contemporaneous offsetting increase in employees whose benefits are vesting. On the other hand, if the value of fund assets does not appreciate or if employees whose benefits vest increase out of proportion to the increase of young employees for whom contributions are being made, then the deficiency in value of fund assets may grow worse. A third factor which also obviously affects the rise and fall of the unfunded liability is the liberality or conservatism with which the level of benefits is fixed. Of course, the entire calculus is significantly affected by life expectancy assumptions and by present-value calculations involving interest rate assumptions.

All this helps to explain why the concept of unfunded vested liability involves a dynamic process. When we attach a number to this concept at a particular point in time we are taking a still picture of a moving target. But Congress was certainly not acting irrationally in requiring that such a still picture be taken. Given the dynamic nature of the process coupled with the need to appraise it at a particular moment in time, the method chosen to measure the liability is, if not the best available, certainly not without a sturdy basis in logic.

And the choice of the time of withdrawal for assessing the liability is far from irrational. It is at this time that Congress apparently believed the proposed withdrawer should be confronted with the immediate prospect of assuming the economic burden of providing an actuarially sound backing for the promised pensions. Only when that burden becomes part of the choice of the proposed withdrawer, can that choice be made with appropriate concern for the economic expectations of the beneficiaries of the plan. If the burden is contingent or long-deferred, the employer choice may not take it adequately into account. This may lead to unwarranted withdrawals, re-

sulting economic decline of the plan and a domino effect of further and ever more disruptive employer withdrawals.

Appellants also argue that there was no "hard" evidence available to Congress concerning the "true" risks which withdrawals posed. Appellants note that the financial projections which Congress utilized were based upon "computer projected models" and appear to argue that Congress should not have acted until more empirical evidence was available.

We perceive no merit in this argument. Congress has no obligation to wait until a potential problem matures into an actual crisis before enacting corrective legislation addressing the problem. Congress acted rationally in choosing to try to forestall future pension crises involving millions of workers by essentially forcing withdrawing employers to fully fund future pension liabilities. Congress also did not act arbitrarily in fashioning the MPPAA to apply to plans which are currently financially stable as well as to plans in a more precarious financial state. The various moderating features of the MPPAA, such as exclusions from the definition of withdrawal, the partial exemption of certain industries and the *de minimis* exemptions, indicate that Congress attempted to impose the burdens of the legislation only to the extent necessary to achieve its legislative objective.

In sum, there is no indication that the congressional response to the problem of financial stability of multiemployer pension plans is either irrational or arbitrary. We have not sought to determine whether a different legislative scheme would be more effective or wiser—that question is not one of constitutional significance. *Turner Elkhorn Mining*, 428 U.S. at 19. Rather, we have determined that the MPPAA rationally furthers legitimate Congressional concerns and we thus find that the withdrawal liability provisions of the MPPAA do not contravene the due process clause of the Constitution.

Although the appellants do not separately address the issue, we think that the operation of the MPPAA with re-

spect to employers who withdrew during the retrospective period, or between April 29, 1980 and September 26, 1980, merits special attention. As the district court noted, employers who withdrew from plans during this 150-day period found that the law governing their withdrawal liability changed after the fact. When they withdrew from a particular plan, their liability was contingent upon the plan's terminating within five years under the provisions of ERISA. On September 26, 1980, however, when the MPPAA was signed into law, their withdrawal liabilities became fixed and payable. Given the constitutionality of withdrawal liability for employers who withdraw after the MPPAA's enactment date, the question presented is whether it is constitutionally irrational and arbitrary also to impose liability upon employers who withdraw during the retrospective period before the enactment of the MPPAA.[24]

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[24] The two courts of appeals that have considered this issue have disagreed over whether due process is violated by application of the MPPAA's withdrawal liability provisions to an employer who withdrew during the retrospective period. *See Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502 (9th Cir. 1983) (holding MPPAA unconstitutional) *and Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, No. 83-1054 (4th Cir. Sept. 9. 1983) (holding MPPAA constitutional). The Ninth Circuit explicity confined its holding to liability for withdrawals during the retrospective period. 705 F.2d at 1502-03, 1515. The Fourth Circuit appeared to uphold the constitutionality of assessing withdrawal liability for withdrawals both during and after the retrospective period although it only had before it an employer which had withdrawn during the retrospective period. *Republic*, slip op. at 4, 8. Because both courts examined the statute under the *Nachman* contract clause analysis, we defer our discussion of those cases. *See* pp. 43-50 *infra*.

In addition to the split in the circuits represented by the Fourth and Ninth Circuits' disagreement in *Shelter Framing* and *Republic Industries*, the district courts of the Northern

(Footnote continued on following page)

It is unquestionable that this "retrospective liability" imposes some added burdens upon the employers that it affects. To some extent, the statute changes the legal effects of a "closed transaction"—the employer's withdrawal. An employer's decision to withdraw during the retrospective period was presumably made based upon the employer's understanding of the current law governing such a transaction. The MPPAA, by virtue of its retrospective effect, could be viewed as changing that situation, leaving the employer with a final decision whose effects are possibly quite different from what was contemplated at the time the decision was initially made.

We must examine this aspect of the MPPAA under the same criteria we utilized with respect to the post-enactment operation of the statute. While we recognize the general disfavor in which our law holds legislation with retrospective effect, it is clear that the constitution "does not prohibit retrospective civil legislation, unless the consequences are particularly 'harsh and oppressive.'" *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977), *quoting Welch v. Henry*, 305 U.S. 134, 147 (1938). Thus we must apply the *Turner Elkhorn Mining* rationality test to this aspect of the MPPAA, with particular attention to whether the imposition of liability during the retrospective period is so "harsh and oppressive" that the

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[24] *continued*

District of Illinois have been unable to agree on the constitutionality of MPPAA. For example, Chief Judge McGarr of the Northern District recently held, contrary to Judge Getzendanner's conclusion in this case and to Judge Flaum's conclusion in *Transport Motor Express v. Central States Pension Fund*, No. 81 C 4535 (N.D. Ill. May 18, 1983), *rev'd on other grounds*, No. 83-2306 (7th Cir. Dec. 19, 1983), that the "retroactive imposition of withdrawal liability under the MPPAA violates the due process clause of the fifth amendment." *National Steel Service Center, Inc. v. Central States, Southeast and Southwest Area Pension Fund*, No. 82 C 5315, slip op. at 9 (N.D. Ill. Nov. 23, 1983). Of course, the conflict among the circuits is in the process of resolution by the Supreme Court, *see supra* note 21.

retrospective application of the statute must be declared unconstitutional.[25]

We think that two factors clearly indicate that the retrospective aspect of the MPPAA also survives due process scrutiny. First, it was rational for Congress to conclude that it was necessary to impose the added burden of retrospectivity to fully effectuate Congress' purpose in enacting the MPPAA. The district court found that Congress was concerned that one of the many flaws in ERISA which Congress was seeking to correct—possible encouragement of early withdrawal—might have been exacerbated if the MPPAA had not included a retrospective date of effectiveness. *Peick*, 539 F. Supp. at 1055. Congress was concerned that employers would be encouraged to withdraw while the legislation was under consideration if the statute became effective only upon enactment. *Id.* Congress carefully tailored the retrospectivity provisions of the act so as to minimize the concerns caused by these provisions. The bill originally introduced in May of 1979 had an effective date of February 27, 1979, which was the date of the PBGC's recommendations to Congress. As the legislation progressed through the legislative process this date was moved forward so that the final date chosen would encompass the minimum time period which Congress thought necessary to prevent abuse. April 29, 1980, the date finally chosen by Congress as the initial effective date for the MPPAA, was the date by which the bill had evolved into what was essentially its final form.

Second, as this brief recitation of legislative actions involving retrospectivity indicates, the intent of Congress to provide for the retrospective imposition of liability was

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[25] To the extent that this heightened level of scrutiny approaches the type of analysis utilized in contract clause-based cases, we apply this analysis to the operation of the MPPAA in the retrospective period in the "*Nachman*" section of the opinion. *See* pp. 43-50 *infra*. The *Alton Railroad* case is also relevant to this issue. *See* the discussion of that case at pp. 32-33 *supra*.

quite clear from the very beginning of the legislative process. At all times during the retrospective period, employers were fully aware that not only were they already obligated for a species of termination liability under ERISA's contingent liability provisions, but that it was also extremely likely that they would become liable under the MPPAA when it was finally enacted. Thus, the employers who withdrew during this period cannot argue that they are now being required to pay wholly unanticipated liabilities.[26]

Given these circumstances, we find no breach of the Constitution in Congress' rational decision to provide for an effective date prior to final enactment of the legislation. This legislative scheme has been previously employed and sanctioned, *see United States v. Darusmont*, 449 U.S. 292 (1981); *United States v. Hudson*, 299 U.S. 498 (1937), and this approach appears appropriate and necessary in this instance. We hold that the retrospective period of withdrawal liability imposed by the MPPAA also does not violate the Constitution.

*B. Nachman Analysis*

Although we have decided that traditional due process analysis should govern the decision of this case, even if we were to follow the stricter contract clause analysis utilized by this court in *Nachman*, we would find that the MPPAA's withdrawal liability provisions, with respect both to applications during the retrospective period and applications after September 29, 1980, survive *Nachman*-type scrutiny. While it is obviously a much closer case, we

[26] As the district court noted, § 4207 of the MPPAA, 29 U.S.C. § 1387(b) (Supp. V 1981), is also highly relevant in this regard. Section 1387 requires the PBGC to pass regulations by which a withdrawn employer can reduce or eliminate its liability by reentering its plan. Thus, if an employer feels that it has been harmed by its reliance on existing law at the time of the withdrawal, this provision would seem essentially to allow the employer to return to its former status.

think that Congress has sufficiently tailored its legislative action in such a way that "the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's adoption.]'" *Energy Reserves*, 103 S. Ct. at 705, *quoting United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977).

The starting point for this type of analysis is this court's opinion in *Nachman Corp. v. Pension Benefit Guarantee Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980).[27] As discussed, *see* pp. 26-27 *supra*, *Nachman* employed contract clause principles in its analysis of whether the termination liability provisions of ERISA violated due process. Appellants argue first that the *Nachman* court incorrectly interpreted recent Supreme Court precedent concerning the contract clause and utilized too lenient a contract clause standard. The gist of appellants' argument is that the Court's opinion in *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978), indicated that impairments of private contracts were to face as strict scrutiny as state impairments of their own contracts faced under the Court's opinion in *United States Trust*. Appellants thus argue that we must apply a stricter scrutiny to the MPPAA than this court utilized in *Nachman*.

We find no merit whatever in appellants' argument. While some commentators appear to have thought at one time that *Allied Steel* intended to extend the strict level of scrutiny articulated in *United States Trust* to all contract clause cases, *see* Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause*, 1979 Sup. Ct. Rev. 95, 110, 121, the Court's recent opinion in *Energy Reserves Group* makes it clear that this was not

[27] The Supreme Court affirmed *Nachman*, but reviewed only the nonconstitutional questions presented. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980).

the case. *Energy Reserves Group* very clearly indicates that the Court continues to view the contract clause as requiring two different levels of analysis depending upon whether a State is one of the contracting parties.[28] We thus think that *Nachman* correctly chose to employ the more deferential standard of contract clause analysis.

*Nachman* identified four factors to be considered in determining whether legislation satisfied contract clause/due process standards. These factors were: 1) "the reliance interests of the parties affected"; 2) "whether the impairment of the private interest is affected in an area previously subjected to regulatory control;" 3) "the equities of imposing the legislative burdens;" and 4) "the inclusion of statutory provisions designed to limit and moderate the impact of the burdens." *Nachman*, 592 F.2d at 960. In general, we approve and adopt the district court's thorough and insightful analysis and application of the *Nachman* factors to the case before us. The district court found that the decision of Congress to subordinate the reliance interests of employers to those of employees was rational; that the extensive federal regulation of pensions which existed even prior to the MPPAA made less reasonable and compelling the employers' reliance upon existing rights; that the basic structure of the statute was not so inequitable that it could not withstand a facial attack upon its validity; and that there were sufficient

[28] "Unless the State itself is a contracting party, [citing *United States Trust*], '[a]s is customary in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Energy Reserves Group*, 103 S. Ct. at 705-06, *quoting United States Trust*, 431 U.S. at 22-23.

The Court explained *Allied Steel* as being based upon the fact that the challenged Minnesota pension law was not intended to "meet an important general social problem" but was rather being "aimed at specific employers" or "may have [even] been directed at one particular employer . . ." *Energy Reserves Group*, 103 S. Ct. at 705 n.13.

moderating features in the statute to evidence a congressional attempt to "impose liability only to the extent necessary to achieve the legislative purpose." *Peick*, 539 F. Supp. at 1038-52, *quoting Nachman* 592 F.2d at 962.

The application of the *Nachman* analysis to the full sweep of the MPPAA's withdrawal liability provisions is apparently a matter of first impression in the courts of appeals. The Ninth Circuit, in *Shelter Framing*, applied these factors and found that imposition of liability for withdrawals during the retrospective period was unconstitutional, but specifically took "special care to note that [its] holding applies only to those employers who withdrew before the enactment of the Amendments Act" and expressed "no opinion as to the constitutionality of the imposition of liability on employers who withdrew after September 26, 1980." *Shelter Framing*, 705 F.2d at 1514-15. The Fourth Circuit, in *Republic Industries*, applied the *Nachman* analysis and upheld the imposition of withdrawal liability against an employer that withdrew before September 26, 1980. It is unclear whether the court intended its ruling to foreclose any similar challenges brought by employers which withdrew after September 26, 1980.

The first factor to be addressed under the *Nachman* analysis is the reliance interests of the parties. In this case, this factor seems intertwined with the second factor—whether impairment of the private (employer's) interest is affected in an area previously subjected to regulatory control. In any event, evaluation of the reliance interests involves a balancing of the employees' reliance on receiving vested pension benefits with an employer's reliance on its expected right to terminate participation in a pension plan without incurring any additional obligation to fund those benefits. The balance in this case is quite similar to that considered in *Nachman*. Here, as in *Nachman*, the employees had a strong and justifiable expectation that they would receive the *vested* pension benefits to which they had become entitled for their years of service. Withdrawal liability for terminating employers

is a rational means of ensuring that multiemployer plans will not be rendered insolvent or incapable of meeting their obligations by withdrawing employers. The district court found, and we agree, that Congress had sufficient evidence before it to indicate that corrective measures were necessary and that some form of withdrawal liability would be effective. *See also Republic Industries*, slip op. at 22 (attaching "heavy weight" to employees' reliance interests).

The employers' side of the reliance balance is also important, but we find it to be less compelling than that of the employees. Employers have a substantial interest in certainty with respect to pension liabilities, but, as the *second Nachman* factor indicates, employer reliance upon contractual limitations on pension liability are necessarily tempered by the knowledge that these contracts are subject to the extensive federal regulation which pervades the field of pensions. Multiemployer plans, even before the MPPAA, were subject to regulation under ERISA, the Internal Revenue Code, the Labor Management Relations Act of 1947 and the Welfare and Pension Plans Disclosure Act of 1958. Employers can hardly claim at this late date that they had a justifiable expectation that the federal government would not seek to intervene if it appeared that their private pension arrangements were insufficient or inadequate.[29]

These reliance and federal regulatory factors, as in *Nachman*, serve to fully distinguish this case from *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). In *Allied Steel*, the Court invalidated a Minnesota statute which imposed liability on employers for the payment of unfunded benefits, *vested by operation of law*, upon the termination of a private pension plan. In *Nachman* and the case before us, the liability imposed on employers is

[29] The Fourth and Ninth Circuits also found the fact of prior regulation to weigh in favor of constitutionality. *Republic Industries*, slip op. at 23. *Shelter Framing*, 705 F.2d at 1512.

based upon *contractually* vested pension benefits. This difference means that the employees' reliance interest here is much greater than the like interest in *Allied Steel*, where the employees covered by the Minnesota legislation had no contractually vested rights. Another major distinction between the present case (and *Nachman*) and *Allied Steel* is the prior existence of federal regulation in the pension area in contrast to the absence of such regulation in Minnesota. Finally, the Court in *Allied Steel* found that the law in question "was not even purportedly enacted to deal with a broad, generalized economic or social problem." *Allied Steel*, 438 U.S. at 250. In the case before us there can be no doubt that Congress intended to address what it thought to be a social problem with wide-ranging impact.

The Ninth Circuit, in considering the employer-employee balance, found the reliance factors to weigh in favor of employers, mainly on the grounds that the employers' reliance on prior law was the most important such factor to be considered. This view was based upon the Ninth Circuit's finding that an employer could not have known, at the time his decision to withdraw was made (during the retrospective period), what form the final version of the MPPAA would take. The Ninth Circuit also found the employees' reliance interest in any single employer's withdrawal liability to be relatively insignificant. *Shelter Framing*, 705 F.2d at 1511-12.

We agree with the Fourth Circuit that the Ninth Circuit's concern for an employer's reliance on prior law does not reflect reality. *Republic Industries*, slip op. at 22. During the period between April 29 and September 26, 1980, it was clear to anyone concerned about multiemployer pension plans that employers would be subjected to withdrawal liability under the MPPAA. At most, an employer could claim only uncertainty as to the details of this liability, not that the liability was a surprise. An effective date for the legislation prior to enactment was a feature of the MPPAA from the day it was introduced. We thus think that employers had no reasonable basis to

expect that they could withdraw after April of 1980 from multiemployer pension plans without incurring the type of liability contemplated under the MPPAA. On the other hand, employees never had any cognizable reason not to believe that their contractually vested pension benefits would not be paid. Their expectations for their retirement years were both real and reasonable (as well as crucially important). Further, we think the Ninth Circuit's view that employees had only a slight reliance interest in any single employer's withdrawal liability to be wholly unrealistic. The non-imposition of any single employer's withdrawal liability might be the straw that broke the camel's back—if the plan foundered. Who is to say which brick of the thousands forming the edifice of a stable pension plan is without importance, or not to be relied upon?

In sum, we agree with the Fourth Circuit in *Republic Industries* and the district court in this case that the employees' reliance on their employers adequately funding their pension plans outweighs any reliance interest the employers may have had in withdrawing from a plan with impunity.

The third *Nachman* factor involves an examination of the basic equities of imposing withdrawal liability upon employers. This factor is closely tied to the fourth *Nachman* factor—the degree to which the burdens of the legislation are moderated by any limiting features of the statute. As our discussion with respect to due process indicates, we think that, on balance, the burden imposed on individual employers by the MPPAA is reasonable when weighed against Congress' goals and objectives in enacting the MPPAA. *See* p. 39 *supra*. To the extent that the *Nachman*/contract clause analysis would commend a less deferential scrutiny of the equities involved, we think that the equitable balance is closer, but still it leans toward the justification of withdrawal liability.

As we have discussed, a pension funding program which results in unfunded vested benefits necessarily raises the issue of *who* is to fund these liabilities. This is a

complex issue, affected by such factors as the degree to which past participants continue in a plan, the value of plan assets, general economic trends and decisions as to the level of benefits to be paid to plan beneficiaries. There are undoubtedly flaws in Congress' chosen means of dealing with the issue. The blanket imposition of withdrawal liability may well result in protection which eventually proves to be beyond the needs of particular plans. Withdrawal liability may also impose a substantial financial burden on employers at a point when they are least capable of meeting it—when they are liquidating or closing a business. But liquidation is a risky and unpredictable affair, as everyone in business knows.

We see no disabling inequity in imposing withdrawal liability on employers when the pension plans they have joined voluntarily turn out to be underfunded. It is true that an individual employer may not have much influence on many important decisions which affect a plan's financial stability. But, of course, this is the arrangement the employer entered into, and it is the employers' contributions that have been inadequate to keep the vested liabilities fully funded. And given this, the fact remains that we are not to evaluate whether Congress chose the "best" solution to a given problem. Our role is simply to evaluate *rationality*, and the Supreme Court's recent decision in *Energy Reserves* makes clear that that evaluation must be based on proper deference to the decision of the legislature. There is certainly a burden imposed on employers by the MPPAA. But what would be the alternative burden on workers entering into retirement with underfunded or non-existent pensions? Congress has the primary task of equitably distributing the burden of underfunded pensions, and we cannot say that Congress' choice is an inequitable one. *See Republic Industries*, slip op. at 23-24.

A similar analysis must be made with respect to the moderating features of the MPPAA. The MPPAA does contain a variety of features that limit the standard of

when a "withdrawal" occurs,[30] mitigate the amount of liability imposed[31] and reduce or eliminate liability if an employer either resumes operations after a complete withdrawal, 29 U.S.C. § 1387 (Supp. V 1981), or increases its contribution base units after a complete withdrawal. *Id.* § 1388. The MPPAA, however, does not have the 30% of net worth limitation contained in ERISA, which is surely a moderating feature. But this sort of ceiling has the obvious disadvantage of being unrelated to the needs of the plan as measured by the unfunded vested liability. And moderation of this liability through a ceiling may result in shifting the potential burden to continuing employers or to the employees by way of the diminished security of their pensions.

In addition, however, we recognize that the MPPAA does not appear to contain provisions which would moderate withdrawal liability unless the financial circumstances

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[30] Congress apparently made some attempt to limit the definition of "withdrawals" to events that could actually harm the contribution base of plans. Thus, a sale of assets may not trigger withdrawal if the purchasing party contributes to the plan, 29 U.S.C. § 1384 (Supp. V 1981); certain industries have particular definitions of withdrawal based upon their specialized needs, *id.* §§ 1383(b)(2)(B), 1383(c)(1); plans may petition the PBGC for permission to adopt particularized withdrawal rules, *id.* § 1383(f); and "free look" provisions allow new plan participants to withdraw without liability within a certain limited time, *id.* § 1390.

The Fourth Circuit, in *Republic Industries*, found that these ameliorating factors together with *de minimis* exemptions outlined in note 31 *infra*, weighed in favor of the constitutionality of the MPPAA. *Republic Industries*, slip op. at 24-25.

[31] The statute contains "de minimis" exemptions, 29 U.S.C. § 1389(a) (Supp. V 1981), reducing the burden of liability on smaller employers; provisions reducing liability if a withdrawal results from the liquidation or dissolution of an employer's business, *id.* at § 1405; and provisions limiting an employer's liability if installment payments stretch beyond 20 annual payments, *id.* at § 1399(c)(1)(B).

of the plan in question were particularly parlous. The argument for such moderation is made to us: Why impose the onerous withdrawal liability unless a plan is clearly headed for termination or disaster? The answer seems to be that termination or disaster, or escape from termination or disaster, is rarely predictable with certainty. And it is not irrational—it is in fact merely financially conservative—to measure financial health by the unfunded vested liability, even though the ultimate life-span of the plan may be unpredictable. Further, the burden of seemingly inadequate funding must be borne by someone—the withdrawing employer, the continuing employer or, in the ultimate event, the employee. With these cautionary observations, we note the comment of the district court that the absence of some means of providing substantial relief from liability in the case of withdrawal from a "healthy" fund tends to raise some concern as to whether the statute indeed only imposes "liability to the extent necessary." *Peick*, 539 F. Supp. at 1051.

The Ninth Circuit found both the equities and the extent of the moderating provisions to weigh against constitutionality of the retrospective provisions. Although a case may be made for inadequacy of moderating provisions, it may only be made at the expense of the continuing employers or the security of the employees' pensions. And we do not agree that the equitable balance in the case weighs against constitutionality. The Ninth Circuit found that the effective date of April 1980 was arbitrarily selected, that there was no showing of need to justify the imposition of liability which threatens the solvency of employers, and that other legislative programs could have served the same purpose of ensuring the financial health of multiemployer plans. *Shelter Framing*, 705 F.2d at 1512-15. As discussed above, we think that the selection of the April 1980 effective date was reasonable and that there was abundant evidence of need to justify Congress' imposition of liability. The availability of alternative solutions is only relevant to the

extent that an alternative solution might indicate the unconstitutionality of Congress' chosen decision. Because we do not think that any alternative has been proposed which bears on constitutionality, we disagree with the Ninth Circuit's conclusion that the retrospective application of the MPPAA is unconstitutional.

To summarize, we find that, on balance, the withdrawal liability provisions of the MPPAA survive scrutiny under the analysis described in this court's decision in *Nachman*. We reach this conclusion with respect to both the clearly retrospective aspects of the statute and to its after-the-fact impact on existing contracts.

*C. Takings Clause*

We turn now to appellants' claim that the withdrawal liability provisions of the MPPAA also violate the fifth amendment proscription against the taking of private property for public use without just compensation.[32] The district court dispensed with this claim rather cursorily, finding that the "MPPAA does not . . . deprive employees of any rights in *specific* tangible property" and hence that the takings clause was inapplicable. *Peick*, 539 F. Supp. at 1040 n.30 (emphasis in original). While we reach a conclusion similar to that of the district court (and also the Fourth Circuit in *Republic Industries*), we think that the Supreme Court's recent opinion in *United States v. Security Industrial Bank*, 103 S. Ct. 407 (1982), necessitates a closer look at the claim.

Traditionally, it has been understood that in order to make a claim under the takings clause, the claimant must prove that "property," in the sense of "the group of rights inhering in the citizen's relation to [a] physical thing," has been "taken." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). There has been no "set formula" which the Supreme Court has evolved to determine when

[32] ". . . nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

"'justice and fairness' require that economic injuries caused by public action be compensated by the government. . . . Rather, [the Court] has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), *quoting Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). Before reaching the issue whether there has been a "taking," however, we must consider, as a threshold matter, whether the contractual right which employers purportedly enjoy in being insulated from further liability to the pension plans in which they participate is "property" protected under the takings clause.

The appellants argue that "contractual provisions creating investment backed expectations constitute compensable property rights just as much as actual ownership of property." They cite such cases as *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), in support of this proposition. But these cases do not support appellants' position. In *Radford*, the Supreme Court held that the Frazier-Lemke Act, June 28, 1934, c. 869, 48 Stat. 1289, which permitted a debtor to buy back mortgaged property at less than fair market value, violated the takings clause. The Court held the statute void because it constituted a "taking of substantive rights in specific property acquired by the [mortgagee] prior to the Act," *Radford*, 295 U.S. at 590. In *Pennsylvania Coal*, a coal company conveyed surface rights to a parcel of land. A state statute subsequently prohibited mining on the land, precluding the coal company from exercising the right to mine, which it had expressly retained under the deed transferring surface rights. The Court found that the state statute effected a taking of property which constitutionally required compensation. *See also Armstrong*

*v. United States*, 364 U.S. 40 (1961) (governmental foreclosure on uncompleted ships defeated materialmen's liens and constituted fifth amendment "taking").

Appellants' cited cases present situations entirely distinct from the case before us. Appellants ignore the key factor relied upon by the Court in both *Radford* and *Pennsylvania Coal*—the presence of a legally enforceable and recognizable interest in distinct property. Unlike the case before us, *Radford* and *Pennsylvania Coal* involved parties who sought to protect their interests in real property. This dichotomy between "property rights," which are protected by the takings clause, and "contract rights," which are not, was recently reaffirmed by the Supreme Court in the *Security Industrial Bank* case. 103 S. Ct. 407 (1983).

*Security Industrial Bank* involved the constitutionality of section 552(f)(2) of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 522(f)(2) (1982). Section 522(f)(2) allows individual debtors in bankruptcy proceedings to avoid liens on certain types of personal property. The appellees, who were creditors with perfected, but nonpossessory, liens, claimed that the application of section 522(f)(2) to liens acquired before the enactment date of the Act would violate the takings clause of the fifth amendment. While the Court avoided a decision as to the constitutionality of the Act by construing the statute narrowly, its discussion of the takings clause clearly indicates that the Court continues to view this constitutional provision as offering no protection for "contractual rights" as opposed to "property rights." 103 S. Ct. at 411-12. The Court stated that it thought the "property right of the . . . creditor in the collateral" was "quite different in legal contemplation" from the "contractual right of [the same] secured creditor to obtain repayment of his debt." *Id.* at 411. While the Court noted that the "'bundle of rights' which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple," it clearly viewed that "bundle" as being sufficiently identified with specific property that it merited

the protection of the takings clause even if the simple contractual right of a creditor to be repaid would not. *Id.*

The contractual rights of the employees in the case before us are in no way analogous to the type of rights in specific property protected under the takings clause. Appellants identify no interests other than their purely contract-based "right" to avoid liability for further contributions to the pension plans in which they participate. Because this contractual right in no way constitutes a type of distinct and identifiable "property", we need not even reach the question of whether there was a "taking" in this case. We therefore approve the district court's finding that the takings clause is inapplicable to the case before us and that legislative infringement of purely contractual rights is properly scrutinized under the due process clause.

## IV

Finally, appellants contend that the MPPAA's withdrawal provisions are unconstitutionally vague and that the MPPAA's requirement of mandatory arbitration of disputes over withdrawal liability violates the constitutional right of freedom of contract, right of access to the courts and right to jury trial. The district court found little merit in these contentions and we agree. With respect to the vagueness argument, appellants select five terms from the entire statute: the "trucking industry exception," 29 U.S.C. § 1383(d) (Supp. V 1981); the provision exempting a withdrawal caused by a sale of assets to an unrelated party, *id.* § 1384; and the "de minimis" exception, *id.* § 1389. They then argue that, because these particular terms are allegedly vague and difficult to apply, the withdrawal provisions in general are unconstitutionally vague.

In this connection, *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982), establishes a very heavy burden for a party seeking to have a federal regulatory statute declared void for vagueness in a facial challenge. In a facial challenge, "the complainant must demonstrate

that the law is impermissibly vague in all of its applications." 455 U.S. at 497. Appellants have not even attempted to make such a showing. Indeed, it may well be impossible for such a showing to be made in the present posture of this case. There has, as yet, been no attempt to apply the contested language in either arbitration proceedings, as provided for in the Act, or in the district court. The disputed language is not so ambiguous or unintelligible that we may say now that it is "impermissibly vague in all of its applications." We therefore reject the appellants' claim that the MPPAA's withdrawal liability provisions are impermissibly vague on their face. *Accord*, *Republic Industries*, slip op. at 34-35.

We may also quickly dispense with appellants' rather briefly stated claim that the mandatory arbitration provisions of the MPPAA infringe on constitutional rights such as "liberty of contract," "access to the courts," and "the right to a jury trial." There is clearly no abridgment of appellants' right of "access to the courts" since the statute itself expressly provides for judicial review of any arbitration award. 29 U.S.C. § 1401(b)(2) (Supp. V 1981). Appellants do not specify in what manner they find mandatory arbitration provisions to restrict their freedom to contract. They cite *Dorchy v. Kansas*, 264 U.S. 286 (1924), and *Charles Wolff Packing Co. v. Kansas*, 262 U.S. 522 (1923), in support of their claim, but these cases are inapposite. Both *Dorchy* and *Wolff* involved a Kansas statute which created a system of compulsory arbitration for labor disputes. The arbitration tribunal created by the statute had wide-ranging power to settle *private* disputes by imposing "compulsory settlements." *Wolff*, 262 U.S. at 540-44. The compulsory arbitration process of the MPPAA is in no way analogous to this. Under the MPPAA, arbitration is used as a means of encouraging parties to attempt to reach settlement with respect to obligations created by the Act itself. Arbitration is thus merely the first step in resolving conflicts arising from the Act. We do not think that this process in any way restricts the parties' freedom to enter private contractual relationships.

We also reject appellants' seventh amendment-based claim. The Supreme Court's recent opinion in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977), clearly sanctions the use of mandatory arbitration under a statute like the MPPAA. The Court expressly found that Congress may assign to a nonjudicial forum the authority to initially adjudicate claims derived from "statutory public rights" which it has created. Despite appellants' contention to the contrary, we agree with the district court that the MPPAA does indeed create "statutory public rights." Liability under the MPPAA is not a contractually or privately created burden, rather it is imposed by law and its benefits eventually inure to all beneficiaries of multiemployer pension plans. We therefore conclude that Congress did not abridge the appellants' rights to a jury trial under the seventh amendment by requiring appellants to arbitrate their dispute before seeking a judicial remedy.

V

Hence, the withdrawal liability provisions of the MPPAA survive every constitutional scrutiny. And we find that the MPPAA, as it is presented in the context of this case, is neither impermissibly vague nor do its mandatory arbitration provisions infringe upon constitutional rights. We thus AFFIRM the judgment of the district court.

ESCHBACH, *Circuit Judge*, dissenting. To establish standing, each of the Employer Associations carried the burden of demonstrating that at least one of its members is "suffering immediate or threatened injury of the sort that would make out a justiciable case had the member . . . brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). The 705 Fund carried the burden of establishing its own personal injury. Because I believe that the record fails to reveal any injury sufficient to satisfy the case or controversy requirement of Article III, I would vacate the order granting summary judgment and instruct the district court to dismiss the case for want of subject matter jurisdiction.

The majority holds that employers contemplating whether to cease contributing to the 705 Fund may challenge the constitutionality of the MPPAA. Such an employer would naturally want a decision from a federal court as to the constitutionality of the MPPAA's withdrawal liability provisions. The majority's opinion, therefore, will assist employers in making their plans. In my view, however, what the Employer Associations seek, on behalf of employers still contributing to the 705 Fund, "is pretty close to an advisory opinion in the literal sense." *People of the State of Illinois v. Archer Daniels Midland Co.*, 704 F.2d 935, 941 (7th Cir. 1983).

The majority opinion stands for the proposition that an entity contemplating an action that may create a liability is entitled to seek a legal opinion from a federal court as to whether the liability can legally accrue. In light of the majority's decision, a business organization is seemingly entitled to have a federal court determine the antitrust implications of a future joint venture. Moreover, a firm considering a revision in its employment criteria apparently may seek a federal judge's opinion as to whether the proposed criteria comply with the federal civil rights laws. We all live and work in a world laden with legal uncertainties and there may be value in courts rendering advice. Whatever the advantages, however, I would prefer to abide by the Constitution's proscription against the federal courts issuing advisory opinions.

The record does reveal that four members of the Employer Associations have ceased contributing to the 705 Fund. These employers thus do not need a constitutional ruling to assist them in making a decision whether to withdraw from the multiemployer fund. Without taking further actions, they may be amenable to proceedings to enforce the withdrawal liability provisions of the MPPAA. Contrary to the majority's holding, however, the possibility or "threat" of proceedings to collect a withdrawal liability does not constitute an injury sufficient to confer standing.

For this declaratory judgment action to "present a justiciable controversy the threat of enforcement must have immediate coercive consequences of some sort upon" the four employers no longer contributing to the 705 Fund. *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 252 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982). The record must demonstrate that the possibility of owing a withdrawal liability is inhibiting or injuring the employers' businesses *today*, not at some hypothetical future date. *See People of the State of Illinois v. Archer Daniels Midland Co.*, 704 F.2d 935, 942-43 (7th Cir. 1983). From my reading of the record, I can discover no basis for concluding that the four employers are suffering a present-day injury merely from the existence of the MPPAA and its withdrawal liability provisions.

We know from the record that an employer must disclose on its financial statement its potential withdrawal liability if that figure is "significant" or "material." We further know that a disclosed contingent liability might affect a financial institution's decision to extend credit. That is the extent of the showing that the four employers are suffering a present-day injury as a result of the MPPAA. In light of what we do not know, I find this showing woefully inadequate.

There are good reasons, in fact, to believe that the four employers are not facing a *significant* contingent liability injuring their businesses. At no point have the employers waived their statutory defenses to any attempt to collect withdrawal liabilities. *See, e.g.*, 29 U.S.C. §§ 1383(a),

1461(e)(2)(A) (obligation to contribute ceased prior to MPPAA's effective date); *id.* § 1398 (contributions ceased because of change in corporate structure or labor dispute); *id.* § 1384 (sale-of-assets exemption). Indeed, because the MPPAA states that an employer shall be notified of the amount of liability "as soon as practicable" after it withdraws, *id.* § 1399(b)(1), there is doubt whether the four employers, which have not been so notified, may be held liable under the statute. Furthermore, as the district court noted, owing to the "de minimis" exemption in the MPPAA, "seventy percent of the firms contributing to the Local 705 Fund could withdraw without incurring any liability whatsoever." 539 F. Supp. at 1050. Finally, the significance of a contingent withdrawal liability is further reduced by the fact that the 705 Fund is not interested in collecting any withdrawal liability.

In addition to the Employer Associations' inadequate showing that the employers no longer contributing to the 705 Fund face a significant contingent liability, the record is silent about the current status of these firms. We do not even know if the four employers are currently operating entities. If they are not, it seems unlikely that they are seeking credit and finding the search impaired by the MPPAA. If one of the four actually is seeking credit and finding funds unavailable or more costly because of the MPPAA, an affidavit describing the situation could have been submitted. None was filed and thus the Employer Associations failed to establish an injury that is "real, not imaginary; concrete, not abstract; apparent, not illusory; and demonstrable, not speculative." *Myron v. Chicoine*, 678 F.2d 727, 730 (7th Cir. 1982); *see City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1665 (1983); *J.N.S., Inc. v. Indiana*, 712 F.2d 303, 305 (7th Cir. 1983).

The 705 Fund (and its Trustees) similarly failed to establish that the fund is suffering an immediate, concrete injury.[1] Affidavits submitted by a trustee and the fund's

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[1] There is no indication that the day-to-day investment and managerial operations of the fund are adversely affected by the existence of the MPPAA.

actuary state that, in their opinions, the MPPAA will discourage newly organized employers from commencing contributions to the 705 Fund and will encourage established employers to reduce the number of workers for which they make contributions. The affiants opine that, at some future time, the 705 Fund's viability might be jeopardized.

I do not view these affidavits as a sufficient showing of an immediate, nonspeculative injury. The affidavits do not assert that the 705 Fund's financial status has been injured to date. On the contrary, the actuary's own affidavit reveals that because of the MPPAA the 705 Fund may collect millions of dollars from withdrawing employers. It is incredible to believe, particularly in light of the majority's extensive discussion of the rationality of the MPPAA, that the 705 Fund is suffering an immediate fiscal injury. Incredulity aside, it is clear that the 705 Fund has not established a concrete, immediate, and nonspeculative injury. At some point the harm that the affiants predict might occur, and then the 705 Fund would have standing to bring a declaratory judgment action. *See J.N.S., Inc. v. Indiana*, 712 F.2d 303, 305 (7th Cir. 1983). Until such a time, the 705 Fund's "injury" consists of what the majority terms a "concern" about the MPPAA's constitutionality; a concern, however, is not the type of injury that supports an action in federal court. *See Vander Jagt v. O'Neill*, 699 F.2d 1166, 1177-78 (D.C. Cir.), *cert. denied*, 104 S. Ct. 91 (1983); *D'Amico v. Schweiker*, 698 F.2d 903 (7th Cir. 1983); *Myron v. Chicoine*, 678 F.2d 727, 730 (7th Cir. 1982).

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

# APPENDIX B

Opinion by Judge Cudahy

Judge Eschbach dissenting

JUDGMENT—ORAL ARGUMENT

# United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

December 19, 1983

Before

Hon. **RICHARD D. CUDAHY**, Circuit Judge
Hon. **JESSE E. ESCHBACH**, Circuit Judge
Hon. **LUTHER M. SWYGERT**, Senior Circuit Judge

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| **LOUIS F. PEICK, et al.,** *Plaintiffs-Appellants,* No. 82-2081 *vs.* **PENSION BENEFIT GUARANTY CORPORATION,** *Defendant-Appellee.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. — No. 81 C 1911 — **Susan Getzendanner,** Presiding Judge. |

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

# APPENDIX C

# IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

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|---|---|
| LOUIS F. PEICK, et al., *Plaintiffs*, v. PENSION BENEFIT GUARANTY CORPORATION, et al., *Defendants*. | No. 81 C 1911 |

## MEMORANDUM OPINION AND ORDER

Susan Getzendanner
United States District Judge

On September 26, 1980, President Carter signed into law the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA" or "the Act"). This statute sets forth a comprehensive scheme of federal law regulating multiemployer pension plans. Multiemployer plans are those "to which more than one employer is required to contribute" under the terms of "one or more collective bargaining agreements between one or more employee organizations and more than one employer." 29 U.S.C.A. § 1002(37)(A) (Supp. 1981).

Plaintiffs attack the facial constitutionality of MPPAA on various grounds and cross-motions for summary judgment have been filed. These motions raise complex and novel issues which have been very ably briefed by the parties. The ultimate questions are close, but in my opinion, the challenged provisions of MPPAA survive facial attack.

## I. THE BACKGROUND OF MPPAA

The 1974 enactment of the Employee Retirement Income Security Act ("ERISA") marks the initial attempt by the federal government to regulate pension plans in a comprehensive manner.[1] This statute contains numerous provisions:

> Title I attacks the lack of adequate "vesting" provisions in many plans. Before ERISA, for example, if a plan did not provide for vesting until retirement, an employee with 30 years of service could lose all rights in his pension benefits in the event that his employment was terminated prior to retirement. Title I establishes minimum vesting standards to ensure that after a certain length of service an employee's benefit rights would not be conditioned upon remaining in the service of his employer. Employers were required to amend the terms of their plans to reflect these minimum standards effective January 1, 1976. [29 U.S.C.] §1053(a). A second area of difficulty was the inadequacy of the funding cycle used by many plans. To improve the fiscal soundness of these pension funds, Title II amends the Internal Revenue Code to require minimum funding. Title III imposes fiduciary responsibilities on the trustees of the pension funds and provides for greater information and disclosure to employee-participants. The final area of concern addressed by ERISA was the loss of employee benefits which resulted from plan terminations. In order to protect an employee's interest in his accrued benefit rights when a plan failed or terminated with insufficient funds, Title IV establishes a system of termination insurance, effective September 2, 1974.

*Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 951 (7th Cir. 1979), *affd*, 446 U.S. 359 (1980) (hereafter cited as *Nachman*). Most relevant for present purposes is the termination insurance program contained in Title IV. This program is run by the Pension Benefit Guaranty Corporation ("PBGC"), a governmental entity which receives no direct

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[1] This is not to say the federal regulation was nonexistent prior to ERISA. *See* p. 44, *infra* [App.C 32c].

federal appropriations. The PBGC relies instead primarily on premium payments: In 1974, multiemployer plans paid $.50 per participant per year while single employer plans—those created, operated and maintained by a single employer acting alone—paid $1.00 per participant per year.

Upon enactment of the Act in 1974, the PBGC immediately insured the receipt of all "nonforfeitable benefits" that had been earned by employees in single employer plans.[2] A single employer that wished to terminate its plan was thus first required to notify the PBGC. 29 U.S.C. § 1341(a) (1976). If an investigation subsequently revealed that the plan lacked sufficient assets to pay its "nonforfeitable benefits," the PBGC itself became obligated for the shortfall. *Id.* at §1341(c), (b). Any amounts so expended could be recovered from the terminating employer, *id.* at § 1362, but the latter's liability could in no event exceed thirty per cent of its net worth. *Id.* at § 1362(b)(1).[3]

Multiemployer plan benefits were treated differently. They were not insured absolutely upon enactment, but rather were guaranteed solely at the discretion of the PBGC until January 1, 1978. At that time, the guarantees were to become mandatory. *Id.* at § 1381(c)(1). In the interim, the PBGC was authorized to determine on a case-by-case basis whether it would pay a terminating plan's participants the difference between the value of their guaranteed benefits and the value of the plan's assets on the date of termination. *Id.* at § 1381(c)(2). As in the single employer context, secondary employer liability was imposed in all cases in which PBGC funds were actually expended. Specifically, all employers that contributed to a terminated multiem-

[2] Actually, these guarantees were made effective as of June 30, 1974, a date prior to ERISA's enactment. 29 U.S.C. §1381(b) (1976).

[3] Employers were in no event liable to the PBGC on account of terminations occurring prior to the date of ERISA's enactment. 29 U.S.C. §1381(b) (1976).

ployer plan during the five years immediately preceding termination were collectively liable to the PBGC for the amount the latter had disbursed, each employer for its proportionate share of the total. As before, no single employer's termination liability could exceed thirty per cent of its net worth. *Id.* at § 1364.

Employers that withdrew from an on-going (i.e., non-terminating) multiemployer plan thus incurred a contingent liability. It was contingent first upon the plan's terminating within the next five years, and second, in the absence of mandatory benefit insurance, upon the PBGC's deciding to insure the plan's benefits. ERISA did not, in general, obligate a withdrawing employer to provide the PBGC with any security for this potential debt. An exception was recognized, however, in the case of a "substantial" employer, one that had contributed at least ten per cent of all contributions received by the plan over a specified period of time. *Id.* at § 1301(a)(2). Withdrawing employers meeting this description were required to place in escrow an amount equalling what their termination liability would have been had the plan terminated on the date of withdrawal. *Id.* at § 1363(b). Alternatively the employer could furnish a bond. *Id.* at § 1363(c)(1). If no termination actually occurred during the next five years, the escrow was refunded or the bond cancelled. *Id.* at § 1363(c)(2).

There were several reasons why Congress chose not to insure all multiemployer plan benefits immediately in 1974. Congress viewed multiemployer plans as more stable and secure than single employer plans and thus saw less need to insure the former. *See, e.g., Connolly v. Pension Benefit Guar. Corp.,* 581 F.2d 729, 734 (9th Cir. 1978); 126 Cong. Rec. H4116 (daily ed. May 22, 1980) (remarks of Rep. Biaggi). Congress, moreover, was worried about the potential costs of such a program. These worries became more prevalent as January 1, 1978 approached. Senator Javits warned his colleagues in late 1977 that he knew of several multiemployer

plans which planned to terminate soon after the first of the year. *See id.* at S10099 (daily ed. July 29, 1980). Recognizing that it needed more time to study the entire problem, Congress delayed the effective date of the mandatory guarantee program and extended the PBGC's discretionary authority through June 30, 1979. Pub. L. No. 95-214, 91 Stat. 1501 (1977). At the same time Congress ordered the PBGC to prepare a comprehensive report analyzing the multiemployer situation.

The PBGC submitted its report on July 1, 1978. Its major factual findings were that:

1. There were about two thousand covered multiemployer pension plans with approximately eight million participants. Pension Benefit Guaranty Corporation, Multiemployer Study Required by P.L. 95-214, at 1, 20 (1978) (hereafter cited as PBGC Report).

2. About ten per cent of these plans were experiencing financial difficulties that could result in plan terminations before 1988. These plans had about 1.3 million participants. *Id.* at 1, 138.

3. If all of these plans were to terminate, it could cost the insurance system about $4.8 billion to fund all plan benefits then covered by Title IV's guarantee. The annual premium needed to fund this liability would be unacceptably high. *Id.* at 2, 16, 139.

4. Limiting consideration to only those covered multiemployer pension plans which were experiencing sufficiently serious financial difficulties that it was likely they would become insolvent before 1988, the cost to the insurance system to fund all guaranteed plan benefits could be approximately $560 million. The annual per capita premium needed to fund this liability could rise from fifty cents to as much as nine dollars. *Id.* at 2, 16, 140.

The PBGC derived these figures by using a computer model that analyzed and predicted the projected financial

health of a selected sample of plans. The PBGC stressed that it relied solely on economic data and statistical analysis in forecasting the expected number of terminations. It did not attempt to factor in as well any incentives favoring termination which ERISA itself might foster. *Id.* at 137, Appendix XIV. Nevertheless the PBGC argued that such incentives were both present and troubling:

> Under the current statutory provisions, mandatory termination insurance for multiemployer plans would protect virtually all vested benefits in multiemployer plans, since the maximum guaranteeable benefit of $1,000 per month at age 65 is well above the average vested benefit level in multiemployer plans . . .
>
> Since all, or nearly all, of the vested benefits of participants would be guaranteed upon termination under the current law, the cost of plan termination to participants would be greatly reduced. This does not necessarily mean that participants will have an incentive to bargain for plan termination merely to take advantage of the insurance program. However, the removal of the threat of benefit losses does make termination a viable option to active employees in situations in which a high proportion of pension contributions is being used for the benefits of retirees.
>
> The principal deterrent to plan termination under the current program is employer liability, which imposes a direct cost upon employers for termination, and an indirect cost on active employees since less money will be available for other labor costs. However, to assure that termination liabilities do not cause undue business hardship and loss of jobs, employer liability is limited to 30 percent of net worth. Because of this net worth limitation, employer liability may very well be less than the cost of maintaining the plan in some situations. Since the insurance program would cover most, if not all, of participants' vested benefits, it may be to the mutual economic advantage of the employers, the union, and the active employees to terminate the plan.
>
> Other ERISA rules also may weaken a plan and result in eventual termination. The withdrawal rules may dis-

courage large employers from entering multiemployer plans. The restrictions on benefit reductions contained in ERISA may cause a financially troubled plan to terminate, even though the benefits that would be paid if the plan terminated would be less (because of the guarantee limitations) than the benefits that would be paid if the plan were permitted to reduce its obligations to avoid termination. *Id.* at 23-24 (footnote omitted).

The PBGC analyzed in addition a number of ways ERISA could be amended. It examined proposals that would:

1. Require the PBGC to pay guaranteed benefits only when a multiemployer plan became insolvent, rather than simply terminated. *Id.* at 56, 57, 69, 70.

2. Reduce the level of benefits which were guaranteed. *Id.* at 56, 57.

3. Authorize the PBGC to provide financial assistance to multiemployer plans experiencing temporary financial problems. *Id.* at 56.

4. Permit multiemployer plans experiencing financial difficulties to reduce benefit payments. *Id.* at 40.

5. Require faster funding of multiemployer plan obligations. *Id.* at 56.

6. Increase the premiums paid by multiemployer plans. *Id.* at 18, 137-63.

7. Impose upon a withdrawing employer a fixed liability equal to that employer's share of the plan's unfunded vested liability. *Id.* at 40, 57.

On February 27, 1979, the PBGC submitted a legislative proposal advocating these ideas. This was followed on May 3, 1979 by the formal introduction in both houses of Congress of the legislation which ultimately became MPPAA. Because of the scope of the bill, Congress once again delayed the effective

date of the 1974 mandatory guarantee program, this time until May 1, 1980. Pub. L. No. 96-24, 93 Stat. 70 (1979).

The House Education and Labor Committee favorably reported MPPAA on April 3, 1980. The Committee specifically agreed with the PBGC's assessment of the 1974 Act:

> Under the existing termination insurance rules, guarantees are provided by the PBGC to participants in a terminated plan. Guarantee levels are high enough to result in coverage of virtually 100 percent of the vested benefits of participants in certain multiemployer plans. Employers who withdraw from a multiemployer plan more than five years before termination have no further obligation to fund the liabilities of the plan, while employers who remain with a plan until it terminates, or withdraw within five years of termination, are liable to the PBGC for unfunded guaranteed benefits up to 30 percent of net worth.
>
> In the case of a financially troubled plan, termination liability creates an additional incentive for employers to withdraw early. In such a plan, contribution increases may be escalating so sharply that termination liability may prove cheaper than continuing the plan. The remaining employers have an incentive to terminate the plan. Where active employees determine that benefits may be provided for them at considerably less cost than current contributions and are satisfied that vested benefits for retirees and others are virtually 100 percent covered by the guarantees, there is an incentive for the union to agree to terminate the plan. The result is to transfer the cost of providing benefits to the insurance system. The current termination insurance provisions of ERISA thus threaten the survival of multiemployer plans by exacerbating the problems of financially weak plans and encouraging employer withdrawals from and termination of plans in financial distress.

H.R. No. 96-889, Part I, 96th Cong, 2d Sess., 54-55, ***reprinted in*** [1980] U.S. Code Cong. & Ad. News 2922-23 (hereafter cited as *Education and Labor Report*); ***accord, id.*** at 60-61, ***reprinted in id.*** at 2928-29. The House Ways and Means Committee expressed similar views in its report released April 23, 1980.

*See* H.R. No. 96-889, Part II, 96th Cong. 2d Sess., 15, *reprinted in* [1980] U. S. Code Cong. & Ad. News 3004 (hereafter cited as *Ways and Means Report*). On April 30, 1980, Congress for a third time delayed the implementation of the 1974 mandatory guarantees. This extension lasted until July 1, 1980. Pub. L. No. 96-239, 94 Stat. 341 (1980). Finally, on May 22, 1980, the House approved MPPAA by a vote of 374-0. 126 Cong. Rec. H4170 (daily ed.).

Senate approval followed on July 29, 1980, but only after yet another extension—to August 1, 1980—of the PBGC's discretionary authority under the 1974 law. Pub. L. No. 96-293, 94 Stat. 610 (1980). The Senate vote in favor of MPPAA was 85-1. 126 Cong. Rec. S10169 (daily ed.). Differences between the House and Senate versions were eventually reconciled in September of 1980[4] and President Carter's approval followed soon thereafter on the 26th of that month.[5]

For present purposes, what is most significant is that on September 26, 1980, the rules governing an employer's withdrawal from an on-going multiemployer pension plan changed. No longer did such behavior give rise, as it had under ERISA, to a contingent liability payable to the PBGC. Under MPPAA, an employer that withdraws must immediately begin to pay a fixed and certain debt owed to the plan.[6]

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[4] The House repassed its version 363-0 on August 25, 1980. 126 Cong. Rec. H7909 (daily ed.). The senate approved a slightly different bill the following day. *Id.* at S11676 (daily ed.). A conference followed, with the Senate and House agreeing to the conference report on September 18 and September 19 respectively. *Id.* at S12901 (daily ed.); *id.* at H9180 (daily ed.) (vote of 324-1).

[5] A proposal to extend the PBGC's discretionary authority a fifth time failed on August 1. 126 Cong. Rec. H6984 (daily ed.). The 1974 mandatory program was thus ultimately in effect for less than two months, from August 1, 1980 to September 26, 1980, the date President Carter approved MPPAA.

[6] MPPAA also provides for liability in certain cases of "partial" withdrawal. *See* 29 U.S.C. §§1381, 1385. These provisions are not at issue here.

The details of this "withdrawal liability" are extremely complex. To obtain a basic grasp, it is important to realize that MPPAA regulates multiemployer plans of the "Taft-Hartley" variety. These plans are in reality trusts created by collective bargaining between a union and several employers. By law, the union appoints half the fund's trustees, and the employers appoint the other half. 29 U.S.C. § 186(c)(5)(B) (1976). The trust is funded by employer contributions which are made at a rate established by the terms of the collective contract. *Id.* This rate is usually expressed as an amount per time worked or product produced, e.g., $.75 per hour or $1.50 per item. The trustees collect the contributions and then determine, after considering all restraints imposed by the contract and all necessary actuarial data, the level of benefits which can prudently be offered. All decisions as to benefits are within the sole province of the trustees. As a general rule, once an employer parts with its contribution, it retains no rights thereafter to determine how that money should be spent. *But see Borden, Inc.* v. *United Dairy Workers Pen. Program,* 517 F. Supp. 1162 (E.D. Mich. 1981), *discussed at* p.55, n. **, *infra* [App.C 41c n.50].

A plan's vested liability is the actuarial present value of the benefit obligations which have vested.[7] The difference between this figure and the value of the plan's assets is called its unfunded vested liability. Hansen Aff. at 24.[8] Under MPPAA, a withdrawing employer becomes liable on the date of withdrawal for a proportionate share of the latter figure.[9] 29

[7] An employee's right to collect a pension benefit is "vested" when it survives a pre-retirement termination of employment. *Nachman v. Pension Benefit Guaranty Corporation,* 446 U.S. 359, 363-64 (1980).

[8] The Hansen Affidavit was submitted by the A. S. Hansen Company, an actuarial consulting firm.

[9] In general, a complete withdrawal occurs when an employer

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

29 U.S.C.A. §1383(a) (Supp. 1981).

U.S.C.A. §1381 (Supp. 1981). The duty to calculate and collect this liability falls to the plan's trustees.[10] *Id.* at § 1382. The trustees have substantial discretion in deciding how much to assess any given employer; the statute lists several different methods of allocating a plan's unfunded vested liability, and it further empowers the trustees to seek PBGC approval of a completely different method of their own design. *Id.* at §1391. Under the "presumptive" method of section 1391(b), the liability is derived basically by multiplying the plan's aggregate unfunded vested liability by a fraction whose numerator is the sum of all contributions required to have been made by the withdrawing employer during the previous five years. The denominator is the sum of all contributions made by all employers during this same period.[11] If disputes between an employer and the trustees arise over an assessment, they are to be resolved, at least initially, in arbitration. *Id.* at §1401.

One final aspect of MPPAA requires comment. Though its provisions take effect in general upon enactment, the withdrawal liability rules are expressly retroactive to April 29, 1980. *Id.* at §1461(e)(2)(A). Any employer that withdraws after this date and before MPPAA's enactment is thus just as liable as those who leave after September 26, 1980.

## II. THE PARTIES

This suit was brought in part by the trustees of the Local 705 International Brotherhood of Teamsters Pension Fund (the "Fund"). The Fund was created through collective bargaining in 1954 and is now one of the largest multiemployer plans in the country. Hansen Aff. at 4. As of January 31, 1980, 15,733 workers were employed by companies contributing to the Fund.

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[10] Trustees that fail to collect these payments are subject to suit for breach of fiduciary duty. 29 U.S.C. §1105 (1976).

[11] This is a gross oversimplification. The full flavor of section 1391(b) can be obtained only by studying it.

Nearly 4300 additional workers enjoyed a vested pension right even though they no longer worked for a contributing employer. The Fund thus served roughly 20,000 "participants". *Id.* at 12.

During the five plan years ending January 31, 1980, over 600 employers withdrew from the Fund, and over 100 other companies joined. The bulk of all contributing employers employ fewer than five employees. *Id.* at 13. In 1981 each firm contributed $51.00 per week per employee. *Id.* at 17. This contribution rate has steadily increased since the plan's inception and especially in recent years. As late as 1971, it was only $16 per week. *Id.* at 22.

The trustees have increased benefits for active workers over 100% since 1971, keeping these workers roughly even with inflation. However, "[d]ue to the prohibitive high cost, it has not been possible to increase retiree benefits to meet this goal." *Id.*

On January 31, 1980 the Fund possessed assets with a market value of $174.7 million. *Id.* at 7. During the fiscal year ending on that date, the Fund collected $29.8 million in contributions, earned $13.6 million more on investments and disbursed $17.2 million in benefit payments. Administrative costs consumed $677,000. *Id.* at 9.

Despite the positive cash flow generated during this year, the Fund's unfunded vested liability exceeded $183 million on January 31, 1981. This translates into a figure of $11,645 per active worker. *Id.* at 25.

Joining the trustees as plaintiff is the Truck Drivers, Oil Drivers, Filling Station & Platform Workers Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union"). The Union bargained for the Agreement and Declaration of Trust establishing the Fund as well as all subsequent amendments thereto.

Plaintiffs Illinois Motor Truck Operators Association (IMTOA), Illinois Trucking Association, Inc., (ITA),[12] Cartage Exchange of Chicago (CEC), and Motor Carriers Labor Advisory Council (MCLAC) are employer associations that represent numerous companies that contribute to the Fund. IMTOA, ITA, and CEC negotiated the initial Declaration of Trust establishing the Fund. MCLAC became a party to the Second Amended Trust Agreement in 1975.

The named defendants are the PBGC, the Secretary of Labor and the Secretary of the Treasury.[13]

## III. THE PLAINTIFFS' CLAIMS

Plaintiffs base their main constitutional challenge on the due process clause of the fifth amendment. They point out that each contributing employer's sole contractual obligation is to make timely contributions to the Fund in the amounts and under the conditions set forth in the governing collective bargaining agreement; once an employer pays its contributions, it is specifically exempted by the terms of the contract from any future liability to either the Fund or an employee seeking vested benefits. MPPAA thus increases each employer's obligations beyond the level agreed upon. Because of the withdrawal liability provisions, each withdrawn employer must continue to fund the plan following withdrawal even though contributions are not then required under the contract. MPPAA as well increases the obligations of the trustees since it obligates them to calculate and collect a liability that would not otherwise have been due and owing. Plaintiffs conclude from all this that their

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[12] ITA was formerly known as the Central Motor Freight Association.

[13] Because of my rejection of the plaintiffs' claims, I need not address the issues raised by the Secretaries in their separate motion to dismiss.

contractual rights have been impaired to such an extent that due process has been denied.[14]

Plaintiffs argue further that the duties and obligations imposed upon them are arbitrarily more onerous than those imposed upon their single employer counterparts by ERISA. Such invidious discrimination is said to violate the equal protection component of the fifth amendment. Various phrases in MPPAA are also claimed to be impermissibly vague. Plaintiffs finally challenge the arbitration provisions on seventh amendment grounds.[15]

## IV. JUSTICIABILITY

Before addressing the merits of the constitutional attacks on MPPAA, it is first necessary to consider the arguments which have been pressed by various parties appearing as amici curiae. The TMX amici[16] note that though twenty-two employers withdrew from the Fund between April 29, 1980 and the date suit was filed,[17] none was ever assessed a withdrawal liability

[14] Plaintiffs press this argument with respect to MPPAA's treatment of withdrawals occurring after enactment as well as those occurring in the "retrospective" period of April 29, 1980 to September 26, 1980. *See* p.14 *supra* [App.C 11c]. With respect to the latter category of withdrawals, the trustees additionally argue that MPPAA constitutes a forbidden ex post facto law since it penalizes them for failing to collect a liability that is fixed by events preceding enactment. *See* U.S. Const. Art. 1, § 9.

[15] In the complaint, the Union makes the additional argument that MPPAA "interfere[s] with rights granted by the National Labor Relations Act." There was little, if any, discussion of this point in the briefing, and I assume that it has been dropped. In any event, a federal statute such as MPPAA is not void simply because it disrupts previous rights also conferred by statute. What Congress gives, Congress can take.

[16] Transport Motor Express, Inc.; E. W. Bohren Transport, Inc., Essex Group, Inc.; Johnson Motor Lines, Inc.; and Republic Industries, Inc.

[17] *See* Hansen Aff. at 34.

by the Fund's trustees. The trustees instead came to this court seeking a declaratory judgment that MPPAA is void. This scenario leads TMX to conclude that no Article III "case or controversy" exists. TMX, joined by the American Trucking Association, Inc. (ATA), further contends that even if subject matter jurisdiction is present, the controversy nevertheless remains insufficiently ripe for adjudication.

The constitutional argument is that no plaintiff has standing to challenge MPPAA. TMX contends that only the twenty-two withdrawn employers have actually suffered injury-in-fact within the meaning of Article III. Since there are no allegations that any one of these twenty-two companies is now a member of a plaintiff association, it follows in TMX' view that no plaintiff can assert the needed injury. In addition, TMX argues that in any event, the named defendants have done nothing by themselves to cause any plaintiff harm. Cf. *Valley Forge v. Americans United,* 102 S.Ct. 752, 758 (1982) ("at an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the *defendant,'*...") (quoting *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979) (emphasis added)). Neither argument withstands analysis.

Subsequently filed affidavits establish that at least three of the withdrawn employers[18] currently remain members of the plaintiff associations. Supplemental Exhibits 4-6. Moreover, TMX is mistaken in believing that the requisite injury is felt only by those employers who have actually withdrawn from the Fund. Injury-in-fact is also suffered by all employers who are members of the plaintiff associations and who are seriously contemplating withdrawal in the near future.[19] These employers must disclose their potential liabilities to the financial

[18] One withdrew between April 29, 1980 and September 26, 1980. The two others withdrew after enactment.

[19] The existence of such member-employers has been verified by affidavits filed under seal. Supplemental Exhibits 1-3.

community, and this likely diminishes their access to credit. *See* Supplemental Exhibits 7-9. Furthermore, in that the trustees must now discharge extensive unbargained-for responsibilities and obligations, they too have been injured in a concrete way. On the other hand, I agree with TMX that the Union's assertion of injury is too speculative to support federal jurisdiction. The possibility that the withdrawal liability provisions might create long-run incentives harmful to both the Fund and its Union beneficiaries is simply too remote and nebulous.[20]

TMX further errs when it asserts that the PBGC is an inappropriate defendant for the trustees and employers to sue for redress of their injuries. Hardly an innocent bystander, the PBGC itself possesses ultimate responsibility for administering and enforcing the very law which causes the noted injuries. The PBGC, for example, can bring civil actions to enforce all provisions of Title IV.[21] 29 U.S.C.A. § 1303 (Supp. 1981); *see also id.* at § 1451 (authorizing PBGC intervention in private suits relating to withdrawal liability). The PBGC also promulgates all regulations needed to implement the statute. *Id.* at § 1302(b) (3) (Supp. 1981).[22] In short, there is a sufficiently strong nexus between the acts of the PBGC, on the one hand, and the harm felt by the trustees and the employers, on the other, "that the[se] injur[ies] 'fairly can be traced to the challenged action' and '[are] likely to be redressed by a favorable decision.' " *Valley Forge* v. *Americans United, supra,*

[20] Similarly, the Union does not suffer injury simply because it is a party to a collective contract that has been abrogated in part by MPPAA. At least in the short run, the only entities that are hurt by the elimination of the employer liability disclaimer are the employers and the trustees. While in the long run this *might* not be true, this contingency remains as speculative as before.

[21] At oral argument counsel for the PBGC stated that it was "very likely" that the PBGC would take action if needed. Transcript ("Tr.") at 59. This case is not one in which the threat of enforcement is insubstantial.

[22] The PBGC has already promulgated certain rules. *See* 47 Fed. Reg. 12622 (1982) (to be codified in 29 C. F. R. Part 2645).

102 S. Ct. at 758 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)); *cf. Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 295 (1981) (claim that a federal statute was unconstitutional on its face held to be "properly before" the court in a suit for declaratory and injunctive relief brought against the federal official responsible for administering the law); *Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59, 68-81 (1978) (same).

A constitutional "case or controversy" thus pits the PBGC against both the trustees and the employers that either withdrew from the Fund or seriously contemplate doing so. Since the plaintiff associations properly represent these employer interests,[23] both the associations and the trustees possess standing to litigate this action.[24]

The question of ripeness implicates different issues. The ATA argues here that constitutional adjudication should be stayed until it can be determined exactly how MPPAA affects the various plaintiffs. It claims first that the Fund may be eligible to enjoy the relatively lenient treatment accorded "trucking industry" plans. An employer that ceases to contribute to such a plan does not "withdraw," and does not incur withdrawal liability, unless it "continue[s] to perform work within the jurisdiction of the plan." 29 U.S.C.A. § 1383(d)(1) (Supp. 1981). Even then, no liability is imposed if the PBGC determines that the employer's acts have caused no "substantial damage to [the plan's] contribution base." *Id.* at § 1383(d)(3)(B)(i).[25] The ATA thus argues that the trustees could

[23] *See Hunt* v. *Washington State Apple Advertising Commission*, 432 U. S. 333, 343 (1977); p. 21 & n.** *supra* [App.C 15c n.19].

[24] None of the "prudential" limitations on standing has relevance here. *See generally Valley Forge* v. *Americans United, supra*, 102 S. Ct. at 759-60.

[25] Until the PBGC makes such a determination, the employer must post a bond or place in escrow an amount equal to fifty percent

*Footnote continued on next page.*

obviate the need for constitutional adjudication by seeking and obtaining a PBGC determination that no withdrawal from the Fund has thus far caused "substantial damage."

Alternatively, the ATA suggests that the trustees could ask the PBGC for permission to treat the Fund as a "construction" or "entertainment" industry plan. In such plans an employer that ceases to contribute does not "withdraw" unless it "continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required," or resumes such work within five years. 29 U.S.C.A. § 1383(b)(2)(B) (Supp. 1981) (construction industry); *id.* at § 1383(c)(1) (entertainment industry). Moreover, even if a plan (like the Fund) cannot take advantage of these rules because its contributing employers are not a part of the construction or entertainment industry, its trustees can nevertheless petition the PBGC for the right to adopt a similar definition of withdrawal. *Id.* at § 1383(f); *see also* 47 Fed. Red. 12622 (1982) (to be codified in 29 C.F.R. Part 2645) (establishing procedure through which plans can petition). Since a positive response to such a request might result in a determination that no employer has yet "withdrawn" from the Fund, the ATA argues as before that the trustees should be forced to exhaust this possibility before their claims are heard.

A similar argument arose in *Hodel v. Virginia Surface Mining & Reclamation Association, supra.* Plaintiffs there included an association of surface coal miners and 63 of its

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*Footnote continued from previous page.*

of its potential withdrawal liability. 29 U.S.C.A. § 1383(d)(3)-(B)(ii). If it does not, a "withdrawal" within the meaning of the statute occurs. The bond is cancelled or the escrow refunded if the necessary PBGC finding is made. *Id.* at § 1383(d)(5)(A).

On the other hand, if the PBGC determines within 60 months of the date the employer ceases to contribute that "substantial damage" has in fact occurred, the full withdrawal liability becomes due and owing as of the initial date. *Id.* at § 1383(d)(4). If no determination is made either way within this period, the bond is once again cancelled or the escrow refunded. *Id.* at § 1383(d)(5)(B).

member coal companies. They filed suit for declaratory and injunctive relief arguing that certain provisions of the Surface Mining Control and Reclamation Act were unconstitutional. One argument asserted was that the Act, by restricting the ability of the plaintiffs to use their land as they pleased, effected a taking without compensation. In analyzing this challenge, the Court distinguished between a facial challenge to the statute and a challenge to the statute as applied in specific circumstances. The Court determined that the plaintiffs could not challenge the application of the act because they presented no record as to the effect of the act on particular surface mining operations or on the specific parcels of land. Additionally, the court noted that the plaintiffs could have sought either a variance or a waiver from the statute's requirements, and that the "potential for such administrative solutions" confirmed the lack of ripeness of any challenge to the act as applied. 452 U.S. at 297.

Nevertheless, the Court reached and decided the merits of plaintiffs' facial challenge to the act. Neither the lack of a factual record nor the possibility of administrative relief in particular cases precluded the Court from determining that on its face the challenged statute was constitutional. *Id.* at 295-97. Similarly, in the instant case, the lack of a factual record[26] and the possibility of an exemption might indicate a lack of ripeness if plaintiffs were challenging MPPAA as applied. However, they are bringing a facial challenge to the statute and, as in *Hodel,* these factors present no bar to their action. *See generally Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365, 386 (1926).[27]

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[26] TMX argues that the present suit is unripe for this very reason. However, the Hansen Affidavit contains much pertinent information. I will draw upon this data from time to time in order to illustrate various general points.

[27] One other jurisdictional objection has been asserted, this time by the PBGC. The PBGC believes that no employer can sue if it has

*Footnote continued on next page.*

## V DUE PROCESS: POST-ENACTMENT WITHDRAWALS

The focus here is on employers that withdraw from a multiemployer plan after September 26, 1980. The question to be resolved is whether it violates due process to subject such an employer to withdrawal liability, if, prior to enactment, an enforceable contract protected it from this form of liability.[28]

The governing framework for analysis is set forth in *Nachman, supra,* a decision in which the Seventh Circuit rejected a similar due process attack on the single employer insurance system created by ERISA. This case arose when Nachman terminated its single employer plan in 1975. At that time, the plan's assets were insufficient to satisfy all vested claims for benefits, and the contract establishing the plan exempted Nachman from any obligation to make up this difference:

> Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of th[e] Plan, there shall be no liability or obligation on the part of the company to make any further contribution to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid.

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*Footnote continued from previous page.*

actually withdrawn, since it must instead pursue arbitration. However, no employer can demand arbitration unless the trustees first demand payment. 29 U.S.C.A. §§ 1399(b), 1401(a) (Supp. 1981). As no demands have here been made, it is hard to understand how the employers could pursue their arbitration "remedy." *Compare R. A. Gray & Co.* v. *Oregon-Washington Carpenters-Employers Pension Trust Fund, et al.*, No. 81-912 (D. Ore. Dec. 1, 1980) in which an employer was ordered to arbitrate only after it had been served with a demand for payment by the trustees.

[28] Because I believe that Congress could constitutionally impose this liability upon employers, I think it follows *a fortiori* that it could impose upon the trustees the subsidiary duties of calculation and collection. I will not discuss their separate claims any further.

*Nachman, supra,* 592 F.2d at 950 (quoting Article V, section 3 of the Nachman plan). Nachman nevertheless became concerned that it could be held liable for the shortfall under ERISA. It brought suit for declaratory relief to resolve this question.

Nachman argued first that its employees' vested benefits were not insurable at all since they were not "nonforfeitable" within the meaning of Title IV. Thus, since no PBGC primary liability existed, no secondary liability could be imposed on Nachman. Alternatively, Nachman contended that to the extent ERISA did indeed subject it to liability, the statute was void for working an unconstitutional impairment of Nachman's contractual disclaimer of liability.

The Seventh Circuit rejected both arguments. The Court construed "nonforfeitable" to encompass the benefits which had vested under the terms of the Nachman plan, and it rejected Nachman's constitutional claim. Judge Sprecher began the discussion of the latter point by noting that the retroactivity of ERISA was at issue:

> Title IV of ERISA does affect Nachman retroactively. The defendants argue that since ERISA only requires employers to assume liability for pension benefits which become due upon termination after the effective date of the Act, it assesses liability prospectively. This argument, however, relates only to the degree of retroactive impact. Although it is true that the statute applies only to prospective terminations, it also applies retrospectively to invalidate exclusion of liability clauses in pension plans agreed upon prior to ERISA. Thus to the extent that ERISA invalidates Nachman's otherwise valid acts which occurred prior to enactment, it is retroactive.

*Id.* at 958 (citation and footnote omitted). The Court next explored the proper standard against which to test ERISA, a federal statute that retroactively impaired contractual rights. On the one hand, only due process review was implicated; the

generally stricter restraints imposed by the contract clause were facially irrelevant since the latter provision applies by its terms only when *state* legislation is challenged. *See* U.S. Const. Art. I, § 10. The court recognized, though, that "several authorities have suggested that the analysis employed in contract clause cases is also relevant to judicial scrutiny of Congressional enactments under the Due Process Clause. Both employ a means-end rationality test. *Nachman, supra,* 592 F. 2d at 959 (citations omitted). Ultimately, however, the Court found it unnecessary to resolve this point: "Since we are convinced that ERISA withstands the scrutiny employed under the Contract Clause cases, we need not decide whether the two clauses *in fact* impose identical restraints on legislative impairment of contracts." *Id.* (emphasis added).

The Court thus sustained ERISA after subjecting it to the essentially two-step process of review mandated by prior contract clause cases. The Court inquired initially whether Nachman's contractual rights had been altered only minimally, noting that a positive response would end the inquiry then and there. When the Court found instead that the impairment was substantial, *id.* at 961 & n.29, it moved to the next stage of analysis: an assessment of the "rationality" of Congress' legislating such an impairment. The Court defined "rationality" in the following manner:

> Rationality must be determined by a comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem. In evaluating the nature and scope of the burden, it is appropriate to consider the reliance interests of the parties affected, whether the impairment of the private interest is effected in an area previously subjected to regulatory control, the equities of imposing the legislative burdens, and the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. It must be emphasized that although these factors might improperly be used to express merely judicial approval or disapproval of the

balance struck by Congress, they must only be used to determine whether the legislation represents a rational means to a legitimate end.

*Id.* at 960 (citations and footnote omitted). After examining these factors, the Court determined that, on balance, the single employer liability provisions were "rational." *Id.* at 961-63. In so doing, Judge Sprecher distinguished *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234 (1978) (hereafter cited as *Allied Steel*), a decision in which the Supreme Court had invalidated a Minnesota pension reform law on identical contract clause grounds.[29]

The Supreme Court granted Nachman's petition for certiorari, but limited its review to the nonconstitutional questions presented, ultimately affirming the Court of Appeals. Significantly, however, the majority quoted extensively in one footnote from the Seventh Circuit's constitutional analysis. *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 367 n.12 (1980). Moreover, in that the decision to affirm exposed Nachman to a substantial liability, it seems doubtful that the Court would have so acted had it truly felt that Nachman's constitutional argument had merit. For these reasons, at least one court has read the Supreme Court's decision as a *sub silentio* affirmance of the constitutional aspect of *Nachman. See A-T-O, Inc.* v. *Pension Benefit Guaranty Corp.*, 634 F.2d 1013, 1024 (6th Cir. 1980); *see also Pension Benefit Guaranty Corp.* v. *Ouimet Corp.*, 630 F.2d 4, 12 (1st Cir. 1980), *cert. denied,* 101 S.Ct. 1356 (1981).

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[29] Several other courts have followed *Nachman* in upholding the single employer provisions of ERISA. *See Concord Control, Inc.* v. *International Union,* 647 F.2d 701 (6th Cir.), *cert. denied* 102 S.Ct. 599 (1981); *A-T-O, Inc.* v. *Pension Benefit Guaranty Corp.*, 634 F. 2d 1013 (6th Cir. 1980); *Pension Benefit Guaranty Corp.* v. *Ouimet Corp.*, 470 F. Supp. 945 (D. Mass. 1979), *aff'd,* 630 F. 2d 4 (1st Cir. 1980), *cert. denied,* 101 S.Ct. 1356 (1981); *Lear Siegler, Inc.* v. *Pension Benefit Guaranty Corp.*, 238 Pens. Rep. D-3 (E. D. Mich. 1979).

Clearly, the task at hand is to apply the Seventh Circuit's approach in *Nachman*. Like ERISA, MPPAA retroactively impairs contractual rights.[30] It disrupts the expectancies of all employers that withdraw from the multiemployer plan which is governed by a pre-MPPAA document disclaiming post-withdrawal liability. This is true even as to withdrawals occurring after enactment. *See* p. 29, *supra* [App.C 21c]. Because of this impact, the question arises, *as in Nachman*, whether such a law *must* survive contract clause scrutiny. The court in *Nachman* left this question unresolved,[31] and I will do likewise, since I believe that MPPAA survives such heightened review in any event.

This is not to say that MPPAA works but a mere minimal disruption of contractual expectancies. As one commentator

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[30] MPPAA does not, however, deprive employers of any rights in *specific* tangible property. The "takings" analysis set forth recently in *Matter of Gifford*, 669 F. 2d 468 (7th Cir. 1982), is hence inapposite. *See also In re Ashe*, 669 F. 2d 105 (3rd Cir. 1982).

[31] Besides the authorities cited by Judge Sprecher in *Nachman*, a comparison of two decisions written by Justice Holmes further supports the notion that federal and state laws should be tested against an identical standard when they impair private contracts. *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170 (1921); *Block* v. *Hirsch*, 256 U. S. 135 (1921). Contrary inferences, however, do appear in the cases. *See, e.g., Pension Benefit Guaranty Corp.* v. *Ouimet Corp.*, 470 F. Supp. 945, 956 (D. Mass. 1979); *see also Note, ERISA's Title IV and the Multiemployer Pension Plan*, 1979 Duke L.J. 644, 663-65 (hereinafter cited as Duke Note).

There seems to be more agreement that the same standards govern when the law in question impairs a contract made by the legislating body itself, rather than two private parties. *See Rivera* v. *Patimo*, 524 F.Supp. 136, 143 (N.D. Cal. 1981); *cf.* L. Tribe, American Constitutional Law § 9-5, at 465 n.1 (making the broad assertion that "the due process clause of the fifth amendment has essentially the same effect" as the contract clause, but citing in support only cases dealing with congressional attempts to abrogate government contracts); *but cf. United States Trust Co. of New York* v. *New Jersey*, 431 U.S. 1, 17 n.13 (1977).

has explained, contractual limitations upon employer liability are important aspects of the multiemployer mechanism:

> The same contribution rate is required of each employer without reference to the cost factors of his own employee group. As a result, some employers may pay more and others less than their share of the cost of benefits for their own employees . . .
>
> [T]he Union is the cohesive force demanding that employers accept the plan's average experience in lieu of their own costs and offering a limitation of contribution liability as a *quid pro quo.*

J. Melone, *Collectively Bargained Multi-Employer Pension Plans* 95-96 (1963); *see also* Peick Aff. at ¶¶ 5, 11; Tr. at 7. A law which upsets an arrangement of such centrality cannot be deemed de minimis.

The Act nevertheless withstands facial due process attack because it is "rational" within the meaning of *Nachman.* This conclusion follows from an examination of the factors deemed relevant in that decision.

### A. The Reliance Interests[32]

The basic justification for withdrawal liability is not hard to discern. By obligating a withdrawn employer to amortize its share of the unfunded vested liability which remains in its former plan, withdrawal liability increases the likelihood that sufficient funds will actually be accumulated to satisfy the debt. The possibility of default is reduced, diminishing in turn the threat that employee expectations of payment will be dashed. Withdrawal liability thus protects employee reliance upon the promise of vested pension benefits.[33] To this extent, it clearly

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[32] This discussion includes an examination of prior federal regulation of multiemployer plans, the second factor identified in *Nachman.*

[33] The desire to protect employee reliance interests clearly motivated Congress. Other provisions of MPPAA further this goal as well. See generally pp. 62-63, *infra* [App.C 46c-47c].

furthers a legitimate and commendable objective. *Nachman, supra,* 592 F.2d at 962; *accord, Pension Benefit Guaranty Corp.* v. *Ouimet Corp.*, 470 F.Supp. 945, 957 n.28 (D. Mass. 1979), *aff'd,* 630 F.2d 4 (1st Cir. 1980), *cert. denied,* 101 S.Ct. 1356 (1981); *Lear Siegler, Inc.* v. *Pension Benefit Guaranty Corporation,* 238 Pens. Rep. D-3, D-5 (E.D. Mich. 1979).

Yet there is a second side to this equation. In deciding to join and remain a part of a multiemployer plan, an employer relies heavily on its contractual protection from post-withdrawal liability. *See* pp. 33-34, *supra* [App.C 24c-25c]. MPPAA undermines this expectancy and accordingly cuts both ways in terms of reliance. It protects the interests of the employees, but does so at the expense of the employers.

The issue is whether it was rational for Congress to adopt this hierarchy of interests. When faced with the identical question in *Nachman,* Judge Sprecher answered in the affirmative. *Nachman, supra,* 592 F.2d at 961-62. A similar result must follow here in the absence of some basis for distinction.

In upholding ERISA, the *Nachman* court relied heavily on the strength of the record before Congress in 1974. This record proved beyond doubt that employee expectations were often frustrated when a single employer terminated its plan; concrete evidence established "that each year somewhere in the vicinity of 20,000 workers lost vested pension benefits due to causes beyond their control when a pension plan terminated." *Nachman, supra,* 592 F.2d at 960-61 (footnote omitted). By contrast, plaintiffs contend, the record underlying MPPAA pales in comparison. They stress that the PBGC cited in its entire 1978 Report to Congress[34] only four actual instances in which a multiemployer plan failed to pay vested benefits during the years following the enactment of ERISA. *See* PBGC Report at Appendix XV. They further argue that Congress could not have reasonably relied upon the PBGC's computer-

[34] All sides agree that the PBGC's Report was the predicate for MPPAA.

generated predictions of future plan terminations. Even the PBGC realized that "the number of terminations . . . cannot be projected with any degree of certainty," and that its figures consequently "[c]ould not be viewed as *precise projections.*" PBGC Report at 4, 138 (emphasis in original).[35] Plaintiffs thus conclude that *Nachman* has no relevance for this case; that since there was no evidence upon which Congress could rationally conclude that multiemployer plan benefits were in fact threatened in 1980, the record does not support the "Draconian penalty" of withdrawal liability; and the more relevant precedent is *Allied Steel:* "[T]here is no showing in the record before [the Court] that this severe disruption of contractual expectations was *necessary* to meet an important general social problem." *Allied Steel, supra,* 438 U.S. at 247 (emphasis added).

I am not persuaded. That few multiemployer plans actually terminated prior to the enactment of MPPAA does not

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[35] At oral argument counsel made the additional charge that the PBGC's computer model was biased since it "was based upon certain premises and the premises were that ERISA was in place, ERISA as we knew it in '74 [with] all the problems that were attendant with ERISA." Tr. at 9. This statement was incorrect to the extent counsel meant to imply that the PBGC's model incorporated ERISA's incentives favoring plan termination. *See* p. 7, *supra* [App.C 6c].

Plaintiffs also argue that the PBGC's 1978 report should be discounted because "as the act began to take shape with new funding schedules and the concept of reorganization, the PBGC's January 2[9], 1980 report to Congress dramatically scaled down [the] estimates of multiemployer plans which might fail to pay promised benefits." Plaintiffs' Brief at 21. The claim seems to be that the 1980 Report establishes that withdrawal liability is unnecessary, that the non-withdrawal liability provisions of MPPAA independently protect employee reliance interests to a sufficient degree. *See* Tr. at 9-10. This is incorrect. The PBGC's relatively low 1980 estimates were based on the assumption that all of MPPAA's provisions were in force, *including those calling for withdrawal liability. See Education and Labor Report, supra,* at 219, *reprinted in* [1980] U.S. Code Cong. & Ad. News 2985.

by itself prove that Congress had no grounds for concern. Congress need not wait for an actual disaster to strike before attempting a cure. Congress, moreover, was well aware of limitations inherent in the PBGC study. It knew full well that the report did not "establish [ ] with any degree of exactitude . . . the probable incidence of [plan] terminations." *Education and Labor Report, supra,* at 57, *reprinted in* [1980] U.S. Code Cong. & Ad. News 2925. Congress nevertheless believed that the report did establish one basic fact: that the "magnitude of risk"—whatever its exact size—was "intolerably high." *Id.* Congress decided, in short, to take the report seriously. It chose not to gamble on the hope that the PBGC had predicted only an improbable, worst-case possibility. After examining the report in its entirety, I cannot say that this decision was either irrational or unreasonable. Much more would have to be shown to prove otherwise:

> Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption. As is customary in reviewing economic and social regulation, however, *courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.*

*United States Trust Co. of New York* v. *New Jersey,* 431 U.S. 1, 22 (1977) (footnote and citations omitted) (emphasis added); *accord, Norman* v. *B&O R. Co.,* 294 U.S. 240, 311 (1935); *Retirement Board* v. *Alton R. Co.,* 295 U.S. 330, 379 (1935) (Hughes, C.J., dissenting); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking,* 48 Calif. L. Rev. 216, 248 (1960); *The Supreme Court, 1977 Term,* 92 Harv. L. Rev. 57, 97 (1978); *see generally Duke Power Co.* v. *Carolina Env. Study Group,* 438 U.S. 59, 83-84 (1978); Note, *A Process-Oriented Approach to the Contract Clause,* 89 Yale L.J. 1623, 1636-37 (1980) (hereafter cited as Yale Note).[36] In

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[36] In *Allied Steel,* the Supreme Court did not defer to the judgments of the Minnesota legislature simply because they were

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1980 as in 1974, there was sufficient evidence before Congress to justify a law impairing employer reliance.

Plaintiffs next argue that *Nachman* is distinguishable because MPPAA impairs employer reliance interests of a more formidable nature than those disrupted by ERISA. Further background is needed to explore this contention.

In *Allied Steel* the Supreme Court voided a Minnesota statute that obligated employers to pay a "pension funding charge" upon the termination of their Minnesota operations. In essence, employers were required to purchase annuities sufficient to fund pensions for all Minnesota employees with more than ten years experience. Under the terms of the actual Allied Steel plan, by comparison, no pension rights vested in less than fifteen years, and pensions were payable upon termination only to the extent that funds remained in the plan. The Minnesota law thus disrupted two of Allied's expectancies: (1) that it would never have to pay anything at all to its employees with more than ten, but less than fifteen, years experience; and (2) that it would never have to pay its vested employees anything more than the amounts it had put into its plan prior to termination, regardless of how much these employees had actually earned. In condemning the Minnesota law, the Supreme Court stressed only the former impairment. *Allied Steel, supra,* 438 U.S. at 246. This reasoning prompted the court in *Nachman* to conclude that the latter type of disruption is relatively insignificant compared to the gain in employee security that thereby results. *Nachman, supra,* 592 F.2d at 961 & n.31; *accord, A-T-O, Inc.* v. *Pension Benefit Guaranty Corp., supra,* 634 F.2d at 1026; *Pension Benefit Guaranty Corp.* v.

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insufficiently articulated. *Allied Steel, supra,* 438 U.S. at 247-48. The decision thus affords "no reason to believe that the Court will not be deferential to legislative policy judgments when the grounds for such deference appear on the record." *The Supreme Court, 1977 Term,* 92 Harv. L. Rev. 57, 97 (1978).

*Ouimet Corp., supra,* 470 F.Supp. at 956. Implicit in *Nachman* is a determination that a single employer cannot *reasonably* rely upon a putative contractual right to terminate without liability a plan whose vested obligations are not fully funded.

One could argue that MPPAA merely places similar restraints upon employers that belong to a multiemployer plan. They too are simply denied the right to abandon a plan that cannot meet its current vested debt. However, as plaintiffs point out, this analogy is flawed. The essence of a single employer plan is a promise to pay benefits running directly from one employer to its employees. This promise, when stripped to its "true nature," is contingent only upon the employer's receiving a specified "length of service." *Nachman, supra,* 592 F.2d at 962 (quoting *Alabama Power Co.* v. *Davis,* 431 U.S. 581, 593 (1977)). Since employees rely on this promise and agree to accept a wage package in which the non-pension component is smaller than it would otherwise have been, the issue in *Nachman* ultimately boiled down to "who should bear the costs of a plan termination: a solvent employer who has received the full benefit he bargained for or the employee with vested benefit rights." *Id.* Judge Sprecher's answer was clear: Nachman would be held liable for the shortfall and would not be allowed to break its promise. In relying upon its liability disclaimer clause, Nachman had relied upon nothing more than an asserted right to break the "true" deal it had struck with its employees. *Cf. A-T-O, Inc.* v. *Pension Benefit Guaranty Corp., supra,* 634 F.2d at 1026 n.14 (under state law, an employer's obligation to pay vested benefits may be absolute, notwithstanding a liability disclaimer clause); *Pension Benefit Guaranty Corp.* v. *Ouimet Corp., supra,* 470 F.Supp. at 957 & n.27 (same); *Lear Siegler, Inc.* v. *Pension Benefit Guaranty Corp., supra,* 238 Pens. Rep. at D-5 (employer liability disclaimers cannot be given effect because their enforcement frustrates valid employee expectations). It was thus hardly surprising that the court found Nachman's reliance to be worthy of little protection. Courts have often sustained

retroactive laws which merely enjoin contracting parties to observe the spirit and terms of their initial contract. *See, e.g., City of El Paso* v. *Simmons,* 379 U.S. 497 (1965); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv. L. Rev. 692, 720-21 (1960).

The same conclusions cannot be drawn in the multiemployer field. Here, the promise to pay benefits runs not from one employer, but from a trust financed by an entire group of firms acting collectively. It follows that the withdrawal of a single employer does not automatically lead to a breach of the payment duty. For even when the plan lacks sufficient assets to pay all claims which have vested as of the date of withdrawal, the employers that remain may pick up the slack to such an extent that the harm caused by the withdrawal substantially abates. An employer that relies upon a liability disclaimer clause contained in a multiemployer plan is therefore not relying upon an asserted right to frustrate employee expectations at will. The employer's reliance is in this sense more reasonable than anything present in *Nachman.*

However, too much cannot be made of this argument. As discussed more fully at p. 48, *infra* [App.C 35c], withdrawals may very well increase the *possibility* of default. An employer that relies upon a contractual exemption from post-withdrawal liability is thus relying upon a right to unleash forces that are potentially destructive of employee benefit security. The difference between this case and *Nachman* is not as great as plaintiffs assert.

Moreover, in a second and perhaps more important sense, Nachman's reliance interest was *more* reasonable than those impaired by MPPAA. It has long been a tenet of constitutional law that "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legitimate end." *F.H.A.* v. *The Darlington, Inc.,* 358 U.S. 84, 91 (1958) (citations omitted); *accord, Allied Steel, supra,* 438 U.S. at 249; *Veix* v. *Sixth Ward Building & Loan Assn.,* 310 U.S. 32, 38 (1940). Reliance upon

*Building & Loan Assn.*, 310 U.S. 32, 38 (1940). Reliance upon existing rights—even those which are reasonable in the abstract—is itself unreasonable when the relying party has notice that future legislation may alter these rights. In *Nachman*, the Court drew upon this doctrine in finding an additional reason to denigrate Nachman's reliance: Since pension plan terminations had previously been subject to federal regulation, Nachman had received warning that its contractual rights might one day be impaired. *Nachman, supra*, 592 F.2d at 962 & n.33.

The same reasoning applies with even greater force here. As plaintiffs acknowledge, multiemployer plans have been subject to decades of pre-MPPAA federal regulation under Section 165 (now section 401) of the Internal Revenue Code, section 302 of the Labor-Management Relations Act of 1947, and the Welfare and Pension Plans Disclosure Act of 1958. Moreover, and most significant, the 1974 enactment of ERISA demonstrated in the clearest possible way that contractual limitations on withdrawal liability were themselves susceptible to federal displacement. By its terms, ERISA voided all absolute exemptions, and installed in their place a regime of contingent liability. *See* p. 4, *supra* [App.C 4c]. This development alone afforded clear warning that the federal government might one day act again and further buttress the legislative scheme it had created.[37] Nachman never received such explicit warning. *Compare Nachman, supra*, 592 F.2d at 962 n.33.

Indeed, by September 26, 1980, the date MPPAA was enacted, Congress acted a second time. It introduced manda-

[37] Similar reasoning appears in *Central States* v. *Alco Express Company*, 522 F.Supp. 919 (E.D. Mich. 1981). At issue there was a provision of MPPAA which affords prevailing trustees an absolute right to attorneys fees in suits brought to recover delinquent plan contributions. The court held that it was constitutional to apply this provision to suits already pending on the date MPPAA was enacted. The court rejected the argument that this was unfair to the defendant since it could not have possibly known at the time it failed to contribute that its acts would *inevitably* lead to this added liability.

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tory multiemployer insurance and thus rendered employer liability less contingent and more certain. *See* p. 4, *supra* [App. C 4c]. In addition, constitutional challenges to the termination insurance system had by then been rejected by the Seventh Circuit in *Nachman* and the First Circuit in *Ouimet.* Two similar district court opinions (*Ouimet* and *Lear Siegler*) were also on the books as was the Supreme Court's decision in *Nachman,* a decision which can be read to approve of the Seventh Circuit's constitutional analysis. *See* p. 32, *supra* [App. C 23c]. None of these decisions, to be sure, dealt specifically with the multiemployer aspects of ERISA. They did nevertheless indicate that a constitutional attack on these provisions was unlikely to succeed. *See generally,* Duke Note, *supra,* at 661-71 (arguing that the 1974 multiemployer provisions of ERISA were constitutional). Thus, to the extent that any employer still contributed to a multiemployer plan on September 26, 1980, and did so solely because it believed that its contractual exemption from post-withdrawal liability was constitutionally immune from all legislative modification, it was not acting in the most reasonable of fashions. *Cf.* Yale Note, supra, at 1629 n.34 (a court "might safely assume that any legislation closely resembling a law previously upheld against a contract clause challenge would violate no legitimate expectations.")[38]

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> [The] Court already had discretion to make such an award under ERISA. Consequently, Alco was certainly on notice that it might be subject to an attorney fee award should it not prevail.

*Id.* at 930. *Central States* was recently followed in *San Pedro Fishermen's Welfare* v. *DiBernardo,* 664 F.2d 1344, 1346 (9th Cir. 1982).

[38] Arguably the analysis should disregard both the creation of mandatory multiemployer insurance and the decisions upholding ERISA. The reason would be that each of these events (with the exception of the Seventh Circuit's decision in *Nachman*) occurred after February 27, 1979, and from this date forward, a pending version of MPPAA threatened to impose full liability upon all subsequent withdrawals. *See* p. 67, *infra* [App.C 50c]. No employer

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In sum, it can be argued that in one sense MPPAA impairs employer interests which are more reasonable than those displaced by ERISA. Yet this contention is largely, if not completely, counterbalanced by the more extensive history of prior federal regulation found in this case. MPPAA, moreover, furthers employee rights that are at least on a par with those shielded by ERISA. In light of these considerations, I find that the "reliance" aspect of *Nachman* has not been distinguished and that the conclusion reached there applies equally here as well: Congress acted rationally in making its basic decision to subordinate the reliance interests of the employers to those of the employees. MPPAA survives this level of analysis.

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could thus have reacted to these later incidents by withdrawing in the certainty that MPPAA would not apply. After this date, employers may have remained in their plans as much out of a fear of MPPAA as out of a continuing belief in the validity of their contractual protection. *See generally* p. 68, *infra* [App.C 50c].

The gist of this argument is that employers "really" relied upon their contracts only prior to February 27, 1979, and that the reasonableness of this reliance should be tested as of then, when it was actually utilized. Several responses can be made. First, the flipside of this argument is that no contract clause claim can be made at all on behalf of those employers that entered a plan after February 27, 1979. By definition, these employers never contributed at a time when they could have "really" relied upon their contracts. When they joined their plans, they "took with notice" and acted at their peril in the clearest sense.

Second, it is not at all obvious that the relevant date for assessing MPPAA is the date the employer's expectations were utilized. An alternative hypothesis seems equally, if not more, plausible: The relevant date should be the date of enactment since the reasonableness of a legislative impairment should be judged solely with reference to the strength remaining in the impaired interest on the date the legislature acts.

Finally, even if the post-February 27, 1979, events are irrelevant, the ultimate conclusion—that the scope of prior federal regulation is greater here than in *Nachman*—remains unchanged. The enactment of ERISA alone provides sufficient grounds for holding that the *Nachman* logic applies *a fortiori* in the MPPAA context.

**B. The Equities**[39]

In the absence of withdrawal liability, a withdrawn employer ceases to fund the plan it has abandoned. The plan's unfunded vested debt remains, however, and must be financed by the employers that contribute in the years that follow. Since these employers must therefore furnish the funds which the withdrawn employer would have contributed had it not departed, Congress concluded that "withdrawals. . . unfairly burden remaining contributors with unfunded benefit obligations left behind by the withdrawn employer." *Education and Labor Report, supra,* at 60, *reprinted in* [1980] U.S. Code Cong. & Ad. News 2928.

In economic terms, Congress believed that withdrawals place upward pressure on plan contribution rates. Following a withdrawal, the contribution base[40] of the affected plan is smaller than it would otherwise have been; in order to finance the plan's vested liability, it may become necessary to increase the contribution rate in order to extract more income from each remaining contribution unit. If this occurs, plan participation becomes less desirable. New employers will be less inclined to join, *see id.* at 77, *reprinted in id.* at 2945; PBGC Report at 13, and the remaining contributors may find withdrawal to be economic for them as well. *See Education and Labor Report, supra,* at 54, *reprinted in* [1980] U.S. Code Cong. & Ad. News 2922. The possibility of plan insolvency increases to some extent, and with it the chance that the PBGC ultimately will become obligated to pay guaranteed benefits.[41] Employee

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[39] This discussion includes an analysis of MPPAA's moderating features, the fourth and final factor deemed relevant in *Nachman.*

[40] A plan's contribution base is the aggregate number of units upon which contributions are assessed. For example, if under the terms of a collective bargaining agreement, all employers contribute $2.00 per employee hour worked, the contribution base is the sum total of all hours worked by all employees in all covered firms.

[41] Congress was most concerned about withdrawals that occur in conjunction with a general economic decline in the industry covered

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interests are, of course, also thereby threatened.[42] Withdrawal liability responds to these concerns by deterring withdrawals and by shoring up the contribution base of an abandoned plan when withdrawals nevertheless occur. MPPAA thus protects the interlocking interests of the PBGC, its premium payers,[43] the non-withdrawing employers and the vested employees. It does so at the expense of the withdrawn employers, the parties whose conduct threatens the harm. This seems equitable. *See generally* L. Tribe, American Constitutional Law, § 9-4 (1978); *id.* at 43 (Supp. 1979).

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by the plan. *See, e.g., Education and Labor Report, supra,* at 55, *reprinted in* [1980] U.S. Code Cong. & Ad. News 2923. However, Congress also believed that prophylactic measures were needed:

> [H]ealthy multiemployer plans and the participants in those plans . . . need the provisions in this bill that will ensure that they continue to accumulate sufficient assets to pay benefits.

126 Cong. Rec. H4162 (daily ed. May 22, 1980) (remarks of Rep. Thompson). Counsel illustrated this point at oral argument with reference to the plaintiffs' Fund. He conceded that the Fund is at present in sound financial shape. Yet, drawing upon the information found in the Hansen affidavit, he argued:

> Now . . . in a decade you have moved from a ratio [of active participants to retirees and terminated vested participants] of 5.97 to 2.12 and I would only suggest that if unfortunately that were to continue another 10 or 20 years, this plan could be in deep trouble. . . .
>
> The purpose or one of the purposes of the withdrawal liability besides discouraging withdrawals is [to insure] that pension plans will not get in the kind of trouble that Congress was having to deal with. It was a preventive measure. It wasn't just remedial. Tr. at 41.

[42] To the extent that vested rights are worth more than the maximum amount guaranteed by MPPAA, employee interests are threatened even if PBGC funds are actually paid. Employee interests are in any event implicated if withdrawals prevent the granting of benefit increases.

[43] The need to keep premiums low can itself justify some form of employer liability. *A-T-O, Inc.,* v. *Pension Benefit Guaranty Corp., supra,* 634 F.2d at 1025; *Nachman, supra,* 592 F.2d at 962-63.

But as with the reliance analysis, there is a second side to the ledger.[44] It was assumed above that an unfunded vested liability remained to be amortized at the time of the withdrawal. But whether this is in fact the case — and whether a withdrawal liability must as a result be paid — is a contingency the withdrawing employer cannot control. The extent of a plan's unfunded vested liability depends upon the value of the plan's assets and vested liability, two factors a withdrawing employer does not regulate. Current asset levels, for example, depend in part upon the economy generally, the trustees' investment acumen, and the promptness with which third-party employers pay contributions and withdrawal assessments. Direct employer control over these contingencies is minimal at best. Moreover, the size of the vested liability depends most crucially upon the level of benefits that the trustees have promised. Yet in setting these amounts, as in everything else, the trustees occupy a fiduciary relationship with the plan's beneficiaries. They consequently owe their allegiance to the interests of the employees and to no other party; even the management-appointed trustees must be guided solely by what is best for the participants: "[T]he duty of the management-appointed trustee . . . is directly antithetical to that of an agent of the appointed party." *N.L.R.B.* v. *Amax Coal Co.,* 453 U.S. 322, 331-32 (1981) (footnote omitted). MPPAA thus creates, in plaintiffs' view, a liability which is determined in large part by parties who cannot legally consider the impact their actions

[44] Plaintiffs evidently disagree with much of Congress' economic reasoning. They believe that withdrawal liability will exacerbate rather than cure the problems Congress identified: "[T]he additional employer financial obligations resulting under the 1980 Act may discourage potential new employers from joining the plan." Hansen Aff. at 30. However, as plaintiff themselves recognize, economic legislation does not violate due process simply because it is unwise. Courts do not sit as "super legislatures" in these matters. *See, e.g., Exxon* v. *Governor of Maryland,* 437 U.S. 117, 124 (1979). Plaintiffs' arguments have therefore been construed as attacks on the fairness, rather than the wisdom, of MPPAA.

have on the employers who foot the bill.[45] *See* 126 Cong. Rec. H4163 (daily ed. May 21, 1980) (colloquy between Representatives Erlenborn and Peyser); Duke Note, *supra*, at 662, 668. Not even the statute condemned in *Allied Steel* shared this defect.[46]

The problem of trustee independence cannot be ignored, as the recent *Bay Area* arbitration decision evidences. *See Bay Area Painters Pension Trust Fund*, 2 Employee Benefit Cases (BNA) 1724 (1981). The *Bay Area* case arose when the "labor" trustees of the Bay Area Painters Pension Trust Fund proposed a benefit increase which had the effect of increasing the plan's unfunded vested liability by $625,000. The "management" trustees objected, and arbitration followed. The arbitrator held for the labor trustees, finding that the increase in the unfunded vested liability was relatively "[in]significant and would not put the Trust into jeopardy of insolvency or other problems."*Id.* at 1734. The arbitrator specifically reasoned that the proposal could not be rejected solely because it increased

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[45] This problem can be exacerbated when the employees of a withdrawn employer are subsequently rehired by a firm that continues to contribute to the plan. Under these circumstances, the plan obtains a windfall. It receives both withdrawal liability payments and contributions made on behalf of the rehired employees, though it would have received only the latter had there been no withdrawal. What makes this significant is that MPPAA does not obligate the trustees to escrow or in any way set aside the withdrawal liability payments for the purpose of reducing the plan's unfunded vested liability. Conceivably, the trustees could instead use the money to raise benefit levels even further. This in fact is what plaintiffs claim is likely to occur given the trustees' fiduciary responsibilities. By paying its withdrawal liability, one firm may thus set in motion a chain of events ultimately leading to an *increased* level of unfunded vested liability.

[46] Allied's liability was based on the benefit levels it itself had set. *Cf. Allied Steel, supra*, 438 U.S. at 237 ("The company . . . retained a virtually unrestricted right to amend the plan in whole or in part. . . .") The same was true of Nachman's liability.

each employer's potential withdrawal liability. The trustees could take into account only the interests of "the participants of the Trust and their beneficiaries. Trustees cannot act for the interest of some third party not a part of the trust concern." *Id.* at 1733.

However, there are limits to this principle. *Bay Area* does not establish a per se rule barring trustee consideration of withdrawal liability:

> While the withdrawal liability of the employers, on its face, is a concern of the employers and not of the participants in the trust, it is possible that such withdrawal liability could have an impact on the overall health of Trust. . . . If in the opinion of the trustees or their advisors, the withdrawal liability of employers has some impact on the ability of the Trust to meet its obligations to the participants and the beneficiaries, then withdrawal liability ought to be considered.

*Id.* at 1734. The legislative history of MPPAA confirms that plan trustees do not violate their fiduciary duties simply because they take steps which minimize the impact of the withdrawal liability rules. If these steps are also in the best interests of the plan,[47] they should be taken. *See Education and Labor Report, supra,* at 67, *reprinted in* [1980] U.S. Code Cong. & Ad. News 2935; 126 Cong. Rec. H3949 (daily ed. May 21, 1980) (remarks of Rep. Thompson).

A second arbitrator has in fact ruled on the basis of this logic. In *Texas Carpenters Pension Plan,* 9 Pens. Rep. (BNA) 99 (1982), the arbitrator was asked to choose from between two proposals designed to increase benefits. Under the proposal put forth by the union trustees, the plan's unfunded vested liability increased $5.3 million or roughly 95 percent. Under the management proposal, there was no increase at all. Both proposals were economically viable, the real difference between

[47] The plaintiff trustees are apparently of this view. *See* p. 50 n.*, *supra* [App.C 37c n.44].

them lying in their relative impact upon the employer's potential withdrawal liability. *Id.* at 103. The arbitrator voted with management. *Id.* at 104.

It is not true, therefore, that the trustees are completely barred from considering the impact of their actions on the employers' withdrawal liability. Actual consideration of these interests is, moreover, likely, given management's statutory right to select half of the trustees. *See generally* Note, *Withdrawal Liability for Double-Breasted Construction Employers Under the Multiemployer Pension Plan Amendments Act of 1980,* 54 So. Cal. L. Rev. 1359, 1373 (1981).[48] The perceived harshness of MPPAA is clearly mitigated by these considerations.[49]

The problem may in fact be one of only limited duration. At a subsequent round of collective bargaining, employers can insist that restrictions upon trustee behavior be written into the actual contract and declaration of trust establishing their plan. They can bargain for language forbidding future benefit improvements which increase the plan's unfunded vested liability by more than a set amount or percentage. *See generally Borden, Inc.* v. *United Dairy Workers Pension Program,* 517

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[48] Employer-appointed trustees do not violate their fiduciary duties simply because they are sensitive to the management perspective of what is best for the plan:

> [T]he administration of a trust fund often gives rise to questions over which representatives of management and representatives of labor may have legitimate differences of opinion that are entirely consistent with their fiduciary duties. . . .
>
> The trustees of employee benefit funds often exercise broad discretion on policy matters with respect to which management and labor representatives may reasonably have different views.

*N.L.R.B.* v. *Amax Coal Co.,* 453 U.S. 322, 343-44 (Stevens, J., dissenting). The majority holding in *Amax* is not to the contrary.

[49] The problem of trustee discretion is also mitigated by MPPAA's higher funding requirements. Because of these provisions, fewer benefits can legally be offered per given amount of income.

F.Supp. 1162 (E.D. Mich. 1981); 126 Cong. Rec. S10103 (daily ed. July 29, 1980) (remarks of Sen. Dole); *Bay Area Painters Pension Trust Fund, supra,* 2 Employee Benefit Cases at 1735. If these demands are accepted, the employers will clearly regain substantial control over their level of exposure.[50]

MPPAA itself ameliorates the additional concerns generated by the employers' inability to control current asset levels. In the first place, the statute places heavy penalties upon employers that are delinquent in paying either contributions[51] or withdrawal assessments.[52] This fact alone should decrease the incidence of tardy payments. MPPAA also allows plans to insure against the possibility that withdrawal liability debts may ultimately prove to be uncollectible. Plans can do this by joining a private "withdrawal liability payment fund," 29

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[50] Under one decision, employers may be able to exercise direct control over the extent of their liability even prior to negotiating a new contract. In *Borden, Inc.* v. *United Dairy Workers Pension Program,* 517 F.Supp. 1162 (E.D. Mich. 1981), Borden sought and obtained a preliminary injunction against a trustee-approved benefit improvement which increased Borden's potential withdrawal liability by $800,000. The court refused to enforce the provision in the contract granting the trustees plenary power over benefit levels, reasoning "that the grant of power to the Fund Committee to set the benefit factor was granted at a time when [Borden's] withdrawal liability was contingent instead of absolute, and that the change in the law thus expands upon the Committee's powers in a manner not contemplated by Borden." *Id.* at 1165.

The *Borden* holding obviously supports my ultimate conclusion that MPPAA is constitutional. However, I have doubts as to the decision's ultimate correctness. It rests at bottom on a belief that "this change in the law [MPPAA] was not one which could have been forseen by the parties when entering into the collective bargaining agreements." *Id.* at 1166. I have already explained why the extensive nature of pre-MPPAA federal regulation militates against this conclusion. *See* pp. 43-46, *supra* [App.C 31c-34c].

[51] *See generally Central States* v. *Alco Express Company,* 522 F.Supp. 919 (E.D. Mich. 1981).

[52] See p. 58 n. * , *infra* [App.C 43c n.56].

U.S.C.A. § 1403(c)(1)(C) (Supp. 1981),[53] or by enrolling in the "supplemental program" the PBGC is to create. *Id.* at § 1402. By enacting such of these provisions, Congress made it more certain that multiemployer plans will actually receive the funds they are owed. Congress lowered the risk that a withdrawing employer will be forced to pay for amounts which others should have supplied in the past.[54]

However, as a general rule, the considerations which have been canvassed thus far offer protection only against assessments which are based on post-enactment *increases* in the level of a plan's unfunded vested liability. These factors do not mitigate the employers' burden of amortizing the liabilities which already existed on September 26, 1980.[55] Plaintiffs in fact claim that the statute contains no moderating features

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[53] Indeed, by joining a withdrawal liability payment fund ("fund"), a plan can guarantee that no employer ever pays a withdrawal liability that is inflated by a third party contributor's past default. This is because the fund can pay for the employer's "unattributable liability." 29 U.S.C.A. § 1403(c)(1)(A) (Supp. 1981). The employer's "attributable liability" is the "value of vested benefits accrued as a result of service with the employer" less "the value of plan assets attributed to the employer." *Id.* at § 1403(c)(3)(A). Its "unattributable liability" is "the excess of withdrawal liability over attributable liability." *Id.* at § 1403(c)(3)(B). If the fund pays for the employer's "unattributable liability," it cannot recover this amount from the employer. *Id.* at § 1403(d)(1)(A), (e)(1). Payments of "attributable liability" can, however, be recovered. *Id.* at § 1403(c)(2). The long and short of all this is that the employer is ultimately liable only for its "attributable liability." The amount it pays is therefore not influenced by whether asset contributions have been made by others.

[54] By selecting half the trustees, the employers also exercise some control over the plan's investment performance.

[55] Prior to enactment, for example, even employer-appointed trustees regularly approved benefit improvements that increased unfunded vested liability. *See generally, Texas Carpenters Pension Plan, supra,* 9 Pens. Rep. at 103; *Bay Area Painters Pension Trust Fund, supra,* 2 Employee Benefit Cases at 1732.

whatsoever. They draw comparisons with *Nachman*, wherein the Court stressed four aspects of ERISA which tempered the burdens it imposed:

(1) Liability could not exceed thirty percent of net worth.

(2) Employers were not liable for the full value of the employees' vested benefits, but only for the amount guaranteed by the PBGC.

(3) Employers could guard against their liability through optional PBGC insurance.

(4) The PBGC could in its discretion allow for reasonable terms of payment.

*Nachman, supra,* 592 F.2d at 963. MPPAA contains the essence of the latter two features. To at least some extent, withdrawal liability can be insured against through the mechanism of a withdrawal liability payment fund. *See,* p.56 & n.***, *supra* [App.C 42c n.53]. The statute further allows the liability to be paid over time; it is not due in one lump sum, but is rather amortized in accordance with the payment schedule established by the trustees. 29 U.S.C.A. § 1399(c) (Supp. 1981).[56] The trustees develop this schedule in two steps. They first calculate the amount the employer must pay each year. In doing this, they rely exclusively on the employer's past contribution history; the payment amount is set at a figure designed roughly to approximate what the employer would have contributed had it not withdrawn. *Id.* at § 1399(c)(1)(C). The trustees then determine how many payments are needed to amortize the withdrawal liability in full. *Id.* at § 1399(C)(1)(A)(ii).

By contrast, no provision of MPPAA embodies the first two moderating features deemed significant in *Nachman*. This is an important basis for distinction, particularly the absence of a net

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[56] However, if the employer defaults on its payments, the entire liability (plus accrued interest) becomes immediately due and owing. 29 U.S.C.A. § 1399(c)(5) (Supp. 1981).

worth limitation. MPPAA, however, lessens its impact in several distinct ways of its own. For example, the mandatory "De Minimis" exemption excuses in general all assessments under $50,000; it further reduces to some extent all others under $150,000. *Id.* at § 1389(a). More sweeping relief—a $100,000 absolute exemption and a $250,000 limit on sliding scale reductions—is also available if the trustees opt for it in their discretion. *Id.* at § 1389(b). Plaintiffs belittle this provision, noting that it affords no relief at all to large employers that incur high levels of withdrawal liability. While this is true, it is equally true that the "De Minimis" rule protects a substantial number of employers. Indeed, when a $100,000 exemption was first proposed, Senator Williams objected that "[a]s much as 40 per cent of all unfunded vested benefits would be excluded under the proposed amendment. In some plans, the proposed amendment would exclude 100 per cent of the unfunded vested benefits." 126 Cong. Rec. S10144 (daily ed. July 29, 1980). Plaintiffs' own estimates support these remarks. They show that because of the "De Minimis" rule, nearly seventy percent of the firms contributing to the Local 705 Fund could withdraw without incurring any liability whatsoever. They further indicate that if the $100,000 exemption option were adopted, over eighty percent could withdraw and face a maximum penalty of only $3,500. Hansen Aff. at 13, 33. The "De Minimis" rule is a significant moderating feature.[57]

Other provisions further reduce employer liability. If more than twenty years are needed to amortize an employer's withdrawal assessment, the "liability shall be limited to the first 20 annual payments." 29 U.S.C.A. § 1399(c)(1)(B) (Supp. 1981). Liability is reduced as well if a withdrawal results from the liquidation or dissolution of an employer's business. *Id.* at

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[57] Plaintiffs further argue that to the extent any amount is deducted from one employer's bill, it simply increases the potential liabilities of the firms that remain. Withdrawal liability payment funds offer a solution to this problem. *See* 29 U.S.C.A. § 1403(c)(1)(B) (Supp. 1981).

§ 1405. Plan trustees have broad discretion to "adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability." *Id.* at § 1404.

Also significant are the provisions of MPPAA which modify the basic definition of "withdrawal" itself. Three of these sections—those pertaining to the construction, entertainment and trucking industries[58]—have already been discussed. *See* pp. 23-25, *supra* [App.C 17c-19c]. Each reflects Congress' recognition that the contribution base of such plans is not harmed by many events that are considered "withdrawals" under the basic provisions of the Act. *See, e.g., Ways & Means Report, supra,* at 15, *reprinted in* [1980] U.S. Code Cong. & Ad. News 3004 (construction and entertainment industries); 126 Cong. Rec. S11671 (daily ed. August 26, 1980) (remarks of Sen. Durenberger) (trucking industry). Congress further recognized that the same might be true of other plans not covered by the technical language of these sections. Congress thus authorized all plans to petition the PBGC for permission to adopt "special withdrawal liability rules similar to the rules described in" the entertainment and construction industry sections. 29 U.S.C.A. § 1383(f)(Supp. 1981); *see* p. 25, *supra* [App.C 18c].[59] Moreover, a withdrawal does not generally occur when an employer ceases covered operations or ceases to contribute "as a result of a bona fide, arm's-length sale of assets

[58] 29 U.S.C.A. §§ 1383(b), (c), (d) (Supp. 1981).

[59] The PBGC has indicated that it will carefully consider all

> information establishing industry characteristics which would indicate that withdrawals in the industry do not typically have an adverse effect on the plan's contribution base. Such industry characteristics include the mobility of employees, the intermittent nature of employment, the project-by-project nature of the work, extreme fluctuations in the level of an employer's covered work under the plan, the existence of a consistent pattern of entry and withdrawal by employers, and the local nature of the work performed.

47 Fed. Reg. 12625 (1982) (to be codified in 29 C.F.R. Part 2645).

to an unrelated party," if the latter entity is itself obligated to contribute to the plan in such amounts that the plan's contribution base substantially retains its pre-sale health.[60] *Id.* at § 1384. Each of these provisions evidences a Congressional attempt "to impose liability only to the extent necessary to achieve the legislative purpose." *Nachman, supra,* 592 F.2d at 962.[61]

Moreover, and perhaps most significant, Congress did not saddle withdrawing employers with the entire burden of stabilizing underfunded multiemployer plans. Rather, as the PBGC argues,

> withdrawal liability was only one feature of a comprehensive revision of the law governing multiemployer plans. Funding rules were tightened so that employers contributing to ongoing plans have to make minimum payments higher than under the 1974 law. Premiums were increased. PBGC funds were made available to supplement employer-derived assets so that insolvent plans can continue operating, though with reduced benefit payments. Participants' vested benefits were made subject to limited

[60] Further, but more limited, relief is afforded by 29 U.S.C.A. § 1398 (Supp. 1981) (withdrawals do not occur if an employer changes business form or suspends contributions during a labor dispute). The PBGC's reliance upon the "free look" rule of 29 U.S.C.A. § 1390 (Supp. 1981) is, however, misplaced. This provision protects only those employers that first "had an obligation to contribute to the plan after September 26, 1980." *Id.* at § 1390(a)(1). It therefore does not assist the relevant class of employers, those already contributing to a plan on the date MPPAA was enacted.

[61] Representative Ashbrook even hinted that Congress had gone too far in tempering the burden of withdrawal liability:

> The existence of special exceptions to the employer withdrawal liability rules; for example, for small employers; the construction, entertainment, and trucking industries; and employers selling their businesses, may restrict their applicability to only a small fraction of the contributing employers in any given plan—thus diminishing the desired objective of discouraging early employer withdrawals.

126 Cong. Rec. H7906 (daily ed. Aug. 26, 1980).

reductions in plans suffering substantial financial difficulties, and the ultimate protection of benefit payments, PBGC's guarantee, was reduced. PBGC Brief at 34.[62]

Congress thus spread the pain around. It chose a mix of options which it thought best responded to the problems it perceived. To be sure, its solution may not have been the wisest. Plaintiffs have so argued, and not without force. Moreover, sentiment already exists on Capitol Hill to amend MPPAA in significant ways. *See* The Wall Street Journal, March 5, 1982, at 40, col. 1. Yet all this is not my concern. My

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[62] It is perhaps also relevant that Congress did not legislate in a vacuum, but rather adopted MPPAA only after consulting with the affected parties for "3 long and torturous years." 126 Cong. Rec. H6933 (daily ed. July 31, 1980) (remarks of Rep. Thompson); *see generally* Yale Note, *supra*, at 1638-39. Indeed, it was often remarked upon in the legislative debate that MPPAA enjoyed "extremely broad support" outside of Congress. *See, e.g.*, 126 Cong. Rec. S10098 (daily ed. July 29, 1980) (remarks of Sen. Williams). Senator Javits listed its backers:

> Groups which have had a significant impact on and generally support the plan termination insurance amendments include the National Coordinating Committee for Multiemployer Plans, the National Construction Employers Council, the United Food and Commercial Workers International Union, the Western Conference of Teamsters Pension Trust Fund, the United Mine Workers of America, the Food Marketing Institute, the Bituminous Coal Operators Association, and the AFL-CIO.
>
> In addition to the foregoing groups, other organizations which have had an impact on S. 1076 include the American Association of Retired Persons, the Graphic Arts Supplemental Retirement and Disabilities Fund, and the Associated General Contractors of America. The general plan termination insurance principles of the bill are supported by the ERISA Industry Committee, the American Bankers Association, the American Council on Life Insurance, the National Association of Manufacturers, and the U.S. Chamber of Commerce.

*Id.* at S10100. Too much should not be made of this point. Employer enthusiasm for MPPAA has clearly waned. *See, e.g.*, The Wall Street Journal, March 5, 1982, at 40, col. 1.

concern is only with the basic fairness of the choices Congress actually made in 1980. Plaintiffs have convinced me that withdrawal liability can be harsh and onerous in certain instances.[63] However, after examining the statute as a whole and the context in which it operates, I cannot say that the "mere enactment" of MPPAA was unconstitutional. The basic structure of the statute is not so inequitable that a facial attack on its validity can succeed. At least as to withdrawals occurring after enactment, no due process violation has been shown.

## VI. DUE PROCESS: PRE-ENACTMENT WITHDRAWALS

Though the President signed MPPAA on September 26, 1980, the withdrawal liability provisions were rendered effective as of April 29, 1980. 29 U.S.C.A. § 1461(e)(2)(A) (Supp. 1981). Employers that withdrew during the intervening 150 day period[64] thus found that the governing law changed after-the-fact. When they withdrew, their withdrawal liability was contingent upon plan termination within five years.[65] Yet, on September 26, it became fixed and due, even if no termination had occurred in the interim. The issue is whether it was permissible for Congress to alter the legal effect of a closed transaction in this manner.

The starting point for analysis is my previous conclusion that withdrawal liability is constitutional in the context of post-enactment withdrawals. This finding dictates the relevant question for present purposes: Does the shift to the pre-enactment context introduce added considerations of a suffi-

[63] I express no opinion as to whether any plaintiff can successfully challenge MPPAA as applied to a particular situation. *See* pp. 26-27, *supra* [App.C 19c]; *see generally Hodel* v. *Virginia Surface Mining & Reclamation Association, supra,* 452 U.S. at 297 n.40; *id.* at 306 (Powell, J., concurring); *Nectow* v. *Cambridge,* 277 U.S. 183 (1928).

[64] I will refer to this period as the "retrospective period."

[65] Of course, prior to August 1, 1980, it was also contingent upon the PBGC's deciding to pay guaranteed benefits in the event of such termination. *See* p. 4 , *supra* [App.C 4c].

ciently compelling nature that the result must change? In other words, I will not repeat the analysis found in Part V. I simply note that the factors discussed there balance out to a finding in the statute's favor.[66] In this section, I consider only the unique and additional issues posed by Congress' decision to utilize a retrospective date of effectiveness.

The most obvious new factor is the presence of a closed transaction. This was not a concern in the post-enactment context because the relevant employers were all plan contributors on the date of enactment. They were thus subject to liability only to the extent they later opted to withdraw in full awareness of the consequences. The same cannot be said of the employers that withdrew during the retrospective period. Their liability was fixed from the moment MPPAA was signed since they had already withdrawn, and at a time when the governing law had failed to inform them of the relevant consequences. The difference in position seems apparent. *See Concord Control, Inc.* v. *International Union*, 647 F.2d 701, 705 (6th Cir.), *cert. denied*, 102 S.Ct. 599 (1981); *A-T-O, Inc.* v. *Pension Benefit Guaranty Corp., supra*, 634 F.2d at 1026.

In *Nachman's* terms, this difference translates into an added element of reliance. The employers that withdrew prior to enactment relied on more than a belief that their contracts would remain valid *in the future*.[67] They relied as well on a belief that their agreements were enforceable at the *actual moment they withdrew*.[68] Whether this is significant depends upon the reasonableness of the latter belief.

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[66] Of course, some of these factors are not relevant in the pre-enactment context. An example would be the possibility of future negotiated limits on trustee behavior.

[67] All employers presumably relied on this expectation when they decided to join, or remain in, their plans prior to enactment.

[68] By referring to an employer's belief in the validity of its contract, I am using shorthand. The most any employer could have reasonably believed was that its contract had been modified only to the extent contemplated by ERISA.

The legislative development of MPPAA becomes relevant at this juncture. When the bill was originally introduced on May 3, 1979, the withdrawal liability rules were effective as of February 27, 1979, the date the PBGC transmitted its initial legislative proposal to Congress. *See* 126 Cong. Rec. S10156 (daily ed. July 29, 1980) (remarks of Sen. Matsunaga). The February 27, 1979 date remained a part of the bill until June 1980, when the Senate Finance Committee determined that it was an unnecessarily harsh starting point. The Committee shortened the retrospective period by more than a year, advancing the effective date to April 29, 1980, where it now stands. *Id.*

By the latter date, the concept of a non-contingent withdrawal liability was hardly novel. It had been the subject of serious discussion for nearly two years, ever since the PBGC had submitted its July 1978 report to Congress. As a result of this legislative scrutiny, MPPAA was far along the road to enactment by April 29, 1980. It had by then already received the approval of the House Education and Labor Committee, the House Ways and Means Committee, and the Senate Labor and Human Resources Committee. Each approved version, moreover, contained the original February 27, 1979 date of effectiveness. These facts, taken together, clearly temper the employers' claims of surprise. They indicate that even the pre-enactment withdrawals were made under circumstances that afforded some notice of the consequences.[69] During the entire retrospective period, there was strong evidence to suggest that MPPAA was likely to pass and that it would be retrospective when it did.[70]

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[69] Senator Matsunaga believed that employers had "ample notice" by May 3, 1979, nearly a year before MPPAA became effective. 126 Cong. Rec. S10158 (daily ed. July 29, 1980).

[70] The evidence grew, of course, as September 26, 1980 approached. Significant milestones were reached on May 22, 1980 and July 29, 1980, the dates of House and Senate passage.

Similar reasoning has been employed by the Supreme Court in decisions sustaining retrospective tax legislation. The Silver Purchase Act of 1934, for example, was upheld even though it taxed transactions consummated prior to enactment:

> The period of retroactivity prescribed for this taxing provision reaches backward from June 19, 1934, the date of the act, to and including May 15, 1934—35 days. For some months prior to this period there was strong pressure for legislation requiring increased acquisition and use of silver by the government, and several bills providing therefor were presented in the Senate and House of Representatives. On May 22 the President sent to Congress a message recommending legislation for increasing the amount of silver in our monetary stocks and further recommending the imposition of a tax of at least 50 per cent. [sic] on profits accruing from private dealing in silver. The bill which became the Silver Purchase Act was introduced May 23 in response to this message. In these circumstances we think the period of retroactivity fixed in the act is not unreasonable, but consistent with the practice sustained by this Court in the cases already cited.

*United States* v. *Hudson*, 299 U.S. 498, 501 (1937) (footnote omitted). Under *Hudson*, it is thus very relevant that "there was strong pressure for legislation" imposing withdrawal liability in the "months prior to [the retrospective] period." Indeed, the present facts are more sympathetic to a finding of constitutionality than those in *Hudson*. In this case, significant legislative activity preceded April 29, 1980. In *Hudson*, the legislation became effective eight days before it was even introduced.[71]

[71] The *Hudson* court's willingness to consider legislative activity that occurred subsequent to the start of the retrospective period is perhaps explained by the fact that the taxpayer challenged the Silver Act only as applied to two sales post-dating this activity. The language of the opinion, however, was broader: "[T]he period of retroactivity fixed in the act is not unreasonable." *United States* v. *Hudson*, *supra*, 299 U.S. at 501. This statement seemingly sanctions

*Footnote continued on next page.*

*Hudson,* moreover, is not an obsolete oddity. Just last year, the Supreme Court utilized similar logic while sustaining a retrospective application[72] of the Tax Reform Act of 1976:

> The proposed increase in rate had been under public discussion for almost a year before its enactment. The Tax Reform Act of 1976 reflected a compromise between the House and Senate proposals. Both bills, however, provided that changes in the minimum tax were to be effective for taxable years beginning after 1975. Appellee, therefore, had ample notice of the increase in the effective minimum rate.

*United States* v. *Darusmont,* 449 U.S. 292, 299 (1981) (per curiam) (citations omitted); *see also Cooper* v. *United States,* 280 U.S. 409, 411 (1930).[73] To be sure, the analogy between the present case, on the one hand, and *Darusmont* and *Hudson,* on the other, can be drawn only so far. Tax cases are to an extent *sui generis. See generally Welch* v. *Henry* 305 U.S. 134, 146-47 (1938). Nevertheless, the quoted passages contain a message that has relevance beyond the narrow realm of the tax

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*Footnote continued from previous page.*

the entire retrospective period, not simply that part of it which followed the beginning of the formal legislative process.

Moreover, even if legislative behavior is relevant only when it precedes a challenged transaction, the present facts remain more conducive to a finding of constitutionality than those found in *Hudson.* In that case, both taxed transactions occurred less than a week after the statute had merely been introduced. Here, three Congressional committees approved MPPAA before any retrospective withdrawal took place. Still more significant legislative action preceded many others. *See* p. 68, n.**, *supra* [App.C 50c n.70].

[72] The taxed transaction occurred on July 15, 1976. The statute was signed October 4, 1976.

[73] *Compare Untermyer* v. *Anderson,* 276 U.S. 440, 445-46 (1928): "The taxpayer . . . cannot forsee and ought not to be required to guess the outcome of pending measures." This categorical assertion cannot be reconciled with the subsequent approaches of *Hudson* and *Darusmont. See generally Fleming* v. *Rhodes,* 331 U.S. 100, 102 n.3 (1947).

code. They indicate that fair warning of a statute's terms can conceivably exist even before it is enacted. The substantiality of Congress' pre-April 29, 1980 activity is thus a factor that militates against the reasonablness of the employers' second reliance interest.[74]

Moreover, rational theories justify a pre-enactment date of effectiveness. Congress was concerned that if the statute became effective only upon enactment, "opportunistic" employers would be encouraged to withdraw while Congress was still debating. *See* 126 Cong. Rec. S10156 (daily ed. July 29, 1980) (remarks of Sen. Matsunaga); *id.* at S10101 (remarks of Sen. Javits). One of the very flaws Congress perceived in ERISA—its encouragement of early withdrawals[75]—would thus have been perpetuated had MPPAA not included a retrospective date of effectiveness. Congress further realized that pre-enactment withdrawals affect equity and plan stability[76] to the same extent as withdrawals occurring after enactment. Congress was particularly concerned with the relative equities between withdrawing and remaining employers: If pre-enactment withdrawals were excused, the firms still contributing on the date of enactment would face greater potential liabilities. *See id.* at S10101; *id.* at S10158 (remarks of Sen. Matsunaga).

Plaintiffs seemingly do not challenge these theories in the abstract. Rather, they argue, somewhat as they did in part V.,

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[74] The tax cases also indicate that a retrospective law is more likely to be upheld if it merely increases a tax rate rather than creates a whole "new tax." *See United States* v. *Darusmont, supra,* 449 U.S. at 298, 300; *Milliken* v. *United States,* 283 U.S. 15, 23 (1931). One could argue that MPPAA is more analogous to the former type of law; it doesn't create withdrawal liability; it simply amends ERISA so that the debt is fixed instead of contingent.

[75] *See, e.g.,* 126 Cong. Rec. H4170 (daily ed. May 22, 1980) (remarks of Rep. Miller). Under ERISA, the longer an employer remained in its plan, the greater was its risk that its eventual withdrawal would occur within five years of termination.

[76] See pp. 47-50, *supra* [App.C 35c-37c].

that these contentions are not supported by the factual record before Congress: Since "there is no recorded instance of employers withdrawing during congresional [sic] debate,[77] it was irrational for Congress to attack a problem that did not exist. Once again, I am unpersuaded. To begin with, plaintiffs' premise is wrong. *Some* employers clearly withdrew during the retrospective phase; thirteen did from the Local 705 Fund alone. *See* Hansen Aff. at 34. I assume, therefore, that plaintiffs are really arguing that *not enough* employers left to warrant concern, that since a "stampede" of pre-enactment withdrawals never materialized, Congress lacked the authority to impose liability on those which in fact occurred. This logic fails. First of all, Congress' policies were threatened by all pre-enactment withdrawals, not simply those which occurred in conjunction with others. It is also not clear why a withdrawn employer should escape liability simply because others "behaved" and did not withdraw themselves. In any event, Congress showed through the course of the legislative debate that it was sensitive to the plaintiffs' concerns. Congress advanced MPPAA's effective date from February 27, 1979 to April 29, 1980 in part precisely because employers had shown "restraint" and had not withdrawn in droves during the interim. *See* 126 Cong. Rec. S10101 (daily ed. July 29, 1980) (remarks of Sen. Javits). In *A-T-O* similar legislative behavior was found to be indicative of rational law-making:

> Congress gave careful attention to the retroactivity problem. . . . Congress not only passed Title IV, it also advanced the effective date from that originally proposed in the House and Senate bills.

*A-T-O, Inc.* v. *Pension Benefit Guaranty Corp., supra,* 634 F.2d at 1026. The very care Congress exercised in picking MPPAA's date of effectiveness bolsters the case in favor of the statute.[78]

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[77] *See* Plaintiffs' Reply Brief at 14.

[78] Plaintiffs also cite various comments made late in the legislative debate by Representative Ashbrook to the effect that, despite dire

*Footnote continued on next page.*

One final factor bears mentioning. Conceivably, many of the employers that withdrew during the retrospective period can still avoid an assessment. Section 1387 of the Act requires the PBGC to promulgate regulations prescribing the conditions under which a withdrawn employer can vitiate its liability by reentering its plan. If employers make use of this provision, they will be subject to further liability only if they engage in an additional post-enactment withdrawal.

There are thus several arguments in MPPAA's favor even in the pre-enactment context. While none is sufficient standing alone, in combination they carry the day. They offset the added burdens of the statute's retrospective effect to such a degree that the balance of considerations continues to tip, as it did in the post-enactment context, in the statute's favor. I must emphasize that this is an extremely close call.[79] Congress has most probably gone to the very limits of its constitutional power.[80] Nevertheless, I cannot say that it went too far.[81]

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predictions, "the worst has not happened." 126 Cong. Rec. H7906 (daily ed. August 26, 1980); *accord, id.* at H7865. Congressman Ashbrook was referring to the fact that no plan had yet terminated under the mandatory 1974 guarantees, though they had been in effect for nearly a month. He was *not* discussing withdrawals from ongoing plans.

[79] Indeed, one court has expressed a "tentative view" that withdrawal liability cannot constitutionally be imposed upon pre-enactment withdrawals. *Shelter Framing Corp.* v. *Carpenters Pension Trust for Southern California,* 9 Pens. Rep. (BNA) 467, 472-76 (C.D. Cal. 1982). In reaching this determination, the court appears to have relied heavily on facts peculiar to the parties before it. *See id.* at 473, 475. The views expressed in *Shelter Framing* are thus not necessarily inconsistent with my holding that MPPAA survives facial attack.

[80] This assumes that contract clause principles are relevant in this suit. *See* p. 33, & n. *, *supra* [App.C 24c n.31]. If they are not, the case for Congress is much clearer. *See Usery* v. *Turner Elkhorn Mining Company,* 428 U.S. 1, 14-21 (1976).

[81] As before, the failure of the employers' claims mandates dismissal of the trustees' due process contentions as well. *See* p. 28, n. *, *supra* [App.C 20c n.28].

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## VII. EQUAL PROTECTION

Plaintiffs further argue that MPPAA imposes burdens which are irrationally more onerous than those levied on single employer trustees, contributors and participants.[82] Plaintiffs point to four distinctions:

(1) Though multiemployer plan trustees are obligated to calculate and collect each withdrawn employer's withdrawal liability, single employer trustees share no similar responsibility. The PBGC calculates and collects a single employer's termination liability itself.

(2) Employers that contribute to a multiemployer plan can incur liability even when the plan continues in existence. Single employers become liable only upon plan termination.

(3) Single employers can in no event become liable for more than thirty percent of their net worth. Multiemployer liability has no upper limit.

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*Footnote continued from previous page.*

The trustees' ex post facto argument, *see* p. 18, n.*, *supra* [App.C 14c n.14], is also without merit. In the first place, MPPAA is not retrospective with respect to these parties. They are subject to suit for breach of fiduciary duty only if they fail to collect a withdrawal liability in the period *following enactment*. This fact alone is fatal to their argument. *See Weaver* v. *Graham*, 450 U.S. 24, 29 (1981). Moreover, "*ex post facto* analysis . . . is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occured." *Id.* at 29 n.13. Civil fiduciary liaility [sic] is not a "criminal or penal consequence." *See generally Agustin* v. *Quern*, 611 F.2d 206, 211 (7th Cir. 1979); *United States* v. *Nasser*, 476 F. 2d 1111, 1117 (7th Cir. 1973). The one decision cited by plaintiffs, *Hiss* v. *Hampton*, 338 F.Supp. 1141 (D.D.C.) (1972) (three judge court), establishes no contrary rule. In *Hiss*, the court merely invalidated a statute which increased the penalties for certain crimes committed before enactment.

[82] The fifth amendment does not tolerate irrational distinctions since the due process clause embodies an equal protection "component." *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

(4) Multiemployer benefits are allegedly protected to a much lesser degree than those earned by single employer plan participants. For example, the PBGC's guarantees become operative upon the termination of a single employer plan, but not a multiemployer plan. In the latter context, only plan insolvency is an insurable event. Moreover, guaranteed benefit levels are generally lower for multiemployer benefits.

Before discussing these claims in detail, a few prefatory comments are in order. Plaintiffs have never argued that these distinctions run along "suspect" lines or that they impinge upon "fundamental rights" as that term is understood in the equal protection context. This being the case, plaintiffs can succeed only upon a showing that Congress has acted in a "patently arbitrary or irrational way." *U. S. Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 177 (1980); *see The Supreme Court, 1980 Term*, 95 Harv. L. Rev. 91, 155 (1981). As the Supreme Court recently explained:

> Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose. Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. As the Court explained in *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979), social and economic legislation is valid unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." This is a heavy burden . . . .

*Hodel* v. *Indiana*, 452 U.S. 314, 331-32 (1981) (citations omitted). In light of these considerations, plaintiff's arguments plainly lack merit.

Withdrawal liability is a debt owed to the plan which has been abandoned. *See* 29 U.S.C.A. § 1383(a) (Supp. 1981). Single employer termination liability is payable to the PBGC. *See* 29 U.S.C. § 1362(b) (1976). In both contexts, therefore, Congress imposed the duty of calculation and collection upon the party to whom the debt runs. Congress rationally treated similarly situated entities, and did not violate the norm of equal protection.

Plaintiffs' second argument also fails. It was not "patently irrational" for Congress to conclude that both withdrawals and terminations pose threats to employee benefit security. *See* p. 43, *supra* [App.C 31c].

The third and fourth arguments are no more substantial. Congress eliminated the thirty percent limitation on multiemployer liability for basically two reasons:

> (1) Congress wished to deter withdrawals by making them more expensive. *See, e.g., Education and Labor Report, supra,* at 61, *reprinted in* [1980] U.S. Code Cong. & Ad. News 2929; 126 Cong. Rec. S10115 (daily ed. July 29, 1980) (Joint Explanation of S.1076 by Senators Williams and Long).
>
> (2) Congress further wished to insulate plans from the deleterious effects of withdrawals that nevertheless occur. By making more employer assets available for this purpose, Congress lowered the PBGC's potential exposure and, thus, the required level of premiums needed to finance the termination insurance system. *See, e.g., Education and Labor Report, supra,* at 63, *reprinted in* [1980] U.S. Code Cong. & Ad. News 2931

Similar considerations also motivated Congress' decision to dilute the guarantees afforded multiemployer plan participants:

> The purpose of the reduced guarantees is to create an incentive to avoid plan insolvency and mass withdrawal. Current high guarantees offer no disincentives to the

parties to let a plan fall into insolvency, or to abandon the plan. But high guarantees offer illusory protection since they result in potentially intolerable costs for the insurance system. After much consideration, the committee has determined that plan continuation, which alone gives participants the opportunity for benefit improvements and future accruals, should be encouraged. At the same time guarantee levels must be high enough to protect participants against loss of the modest level of benefits provided in the plans in declining industries which have been projected to become insolvent because required contributions will rise to uneconomic levels. The committee believes that the level of guarantees in the bill is appropriate to meet these objectives.

In addition, lower guarantees in the early years of the program reduce the risk of excessive costs which might destroy the program altogether. They provide a trial period during which the prophylactic effects of other aspects of the program can be assessed and the guarantee levels then re-evaluated if adequate benefit security is not provided. *Id.* at 69, *reprinted in id.* at 2937.

Plaintiffs concede that the challenged aspects of MPPAA rationally further these legitimate objectives. As a result, their argument rests at bottom on a mere charge that Congress acted in an underinclusive fashion: Since the same logic would have justified an elimination of the thirty percent limit on single employer termination liability, and a reduction of single employer benefit guarantees, it was irrational for Congress to single out multiemployer plans for harsher treatment. The law, however, is clearly to the contrary:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. ***Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.***

*Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489 (citations omitted) (emphasis added); *accord, e.g., Michael M.* v. *Superior Court of Sonoma Cty.,* 450 U.S. 464, 481 n.13 (1981) (Stewart, J., concurring); *Minnesota* v. *Clover Leaf Creamery Co.,* 449 U.S. 456, 466 (1981); *Fullilove* v. *Klutznick,* 448 U.S. 448, 485-86 (1980) (plurality opinion); *City of New Orleans* v. *Dukes,* 427 U.S. 297 303-06 (1976) (per curiam); *Katzenbach* v. *Morgan,* 384 U.S. 641, 657 (1966); *Semler* v. *Dental Examiners,* 294 U.S. 608, 610 (1935); L. Tribe, American Constitutional Law § 16-4 (1978).[83]

Congress was not obligated to "choose between attacking every aspect of [the] problem or not attacking the problem at all." *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1970). Congress had a third option—to remedy only those evils which it reasonably believed to require immediate attention. Indeed, this is exactly what Congress did. Relying on the evidence found in the PBGC's Report,[84] Congress concluded that the potential exposure of the multiemployer insurance system was unacceptably large. *See, e.g., Education and Labor Report, supra,* at 57, *reprinted in* [1980] U.S. Code Cong. & Ad. News 2925. It adopted measures designed to neutralize this threat. Yet lacking similar data implicating the single employer program, Congress left the rules operative in that sphere unchanged. Such behavior was completely rational.[85]

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[83] The bulk of these decisions involved state legislation and were thus decided under the equal protection clause of the fourteenth amendment. They nevertheless remain pertinent to this case: "[T]he Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment." *Schweiker* v. *Wilson,* 450 U.S. 221, 226 n.6 (1981).

[84] *See* pp. 38-39, *supra* [App.C 27c-28c].

[85] In any event, plaintiffs' final argument may rest on an erroneous assumption. It is not clear that fewer PBGC funds are actually available to protect multiemployer, as opposed to single

*Footnote continued on next page.*

## VIII. VAGUENESS

Plaintiffs next allege that MPPAA is unconstitutionally vague. In assessing the statute, the court is guided by three circumstances. First, the challenged statute is federal rather than state, and as one commentator has observed:

> Where a contention of vagueness is advanced with regard to federal legislation, . . . the Court may narrowly interpret the act . . . rather than void it, and there has been a significant tendency to adopt this narrowing, rather than annihilating course.

Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67, 86 (1960) (hereafter cited as Pennsylvania Note), and cases cited therein. The federal judiciary's ability to interpret federal legislation distinguishes such cases from vagueness challenges to state legislation. *See, e.g., Dennis* v. *United States,* 341 U.S. 494, 501-02 (1951); Pennsylvania Note, *supra,* at 83 n.80.

Second, the challenge here is to the statute on its face and not as applied to a particular fact situation. The Supreme Court recently had occasion to define the standard to be used in a pre-enforcement facial challenge. *See Village of Hoffman Estates* v. *Flipside,* 102 S.Ct. 1186 (1982), where the Court upheld a municipal "drug paraphernalia" ordinance.

The Court began its analysis by explaining that a " 'facial' challenge, in this context, means a claim that the law is 'invalid *in toto*—and therefore incapable of any valid application.' *Steffel* v. *Thompson,* 415 U.S. 452, 474 (1974)." *Id.* at 1191 n.5. A facial vagueness challenge can thus succeed only if "the complainant . . . demonstrate[s] that the law is impermissibly

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employer, benefits. MPPAA authorizes the PBGC to extend loans to ongoing multiemployer plans which have not terminated. *See* 29 U.S.C.A. § 1431 (Supp. 1981). Ongoing single employer plans are not eligible for such aid.

vague in all of its applications." *Id.* at 1191. This is a heavy burden.[86] The plaintiff must do more than establish that the statutory standard of conduct is imprecise; the plaintiff must show that the statute specifies no standard at all. *Id.* at 1191 n.7.

Finally, the *Flipside* Court reasoned that the degree of vagueness tolerated under the constitution varies according to the nature of the challenged statute. Civil, as opposed to criminal, statutes are afforded greater tolerance "because the consequences of imprecision are qualitatively less severe." *Id.* at 1193. Statutes regulating economic conduct are also given greater deference:

> Thus, economic regulation is subject to a less strict vagueness test because its subjectmatter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. *Id.* [87]

In the present case, plaintiffs challenge on its face a federal civil statute regulating business activity. Accordingly the constitution tolerates a fair amount of imprecision in the

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[86] Certain language in the Court's opinion suggests that a failure to show statutory vagueness in all circumstances deprives a facial challenger of standing: "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Village of Hoffman Estates* v. *Flipside, supra,* 102 S.Ct. at 1191. But, on the whole, the Court seems to consider it as a matter of failing on the merits. *See, e.g., id.* at 1191 n.7, where the Court quotes from *Parker* v. *Levy,* 417 U.S. 733, 756 (1974): "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."

[87] Much less vagueness is tolerated when first amendment rights are implicated. *See, e.g., Smith* v. *California,* 361 U.S. 147, 150-51 (1959).

statutory terms, and in weighing such imprecision, this court may properly consider the availability of judicial and administrative interpretation to clarify the statute's language. With this in mind, the court now turns to an examination of the specific terms plaintiffs challenge.

Plaintiffs challenge three sections of MPPAA. The first is the "trucking exemption." *See* 29 U.S.C.A. § 1383(d) (Supp. 1981). As we have seen, this provision creates a special withdrawal rule for employers contributing to certain plans, those in which "substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry." *Id.* at § 1383(d)(2). An employer covered by this special rule who ceases contributions or operations "withdraws" within the meaning of the statute only if the PBGC determines that the cessation causes "substantial damage" to the plan's contribution base or the employer fails to furnish a bond or set up an escrow account equal to half of its withdrawal liability.[88]

Plaintiffs contend that the statutory language fails to give "fair warning" as to when the exemption applies. Specifically, they assert that the terms "substantially all," "primarily engaged" and "substantial damage" are unconstitutionally vague. The short answer to this argument is that, in a case involving federal civil economic regulation, unconstitutional vagueness exists only where the statute provides no standard, rather than merely an imprecise standard. Terms such as "substantially all," "primarily engaged" and "substantial damage" provide courts and administrative agencies some guidance, and the boundaries of such terms may be refined through later interpretation.

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[88] The trucking industry rules are described more completely at p. 24 & n. *, *supra* [App.C 17c-18c n.25].

In *Joseph E. Seagram & Sons* v. *Hostetter*, 384 U.S. 35 (1966), the Supreme Court considered a vagueness challenge to a statute regulating the price of liquor sold by brand owners and "related persons." The statute defined a "related person" as one whose "exclusive, principal or substantial business" was the sale of liquor purchased from the brand owner. The challengers contended that the term "principal or substantial" was unconstitutionally vague because it permitted the state administering agency to make arbitrary decisions. The Court disagreed, stating:

> [W]e think it plain under our decisions that if substantiality is the statutory guide, the limits of administrative action are sufficiently definite or ascertainable so as to survive challenge on the grounds of unconstitutionality.

*Id.* at 49 (quoting *Board of Governors* v. *Agnew*, 329 U.S. 441, 449 (1947)). This reasoning applies here.

Clearly, if less that [sic] 50 percent of the contributions to a plan come from employers in the covered industries, the exemption does not apply. In such a case, the application of the statute is not at all vague; therefore, the statute is not vague in all of its possible applications.

Moreover, the term "substantially all" need not be construed in a vacuum; at least one sponsor of MPPAA indicated that the phrase means "at least 85 percent." 126 Cong. Rec. H7900 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson); *accord*, Ford, McNamara and Stanger, *Withdrawal Liability under ERISA After the Multiemployer Pension Plan Amendments Act of 1980*, NYU Thirty-Ninth Annual Institute on Federal Taxation (1981 ERISA Supp.), at 10-20 & n.30; *but see* 126 Cong. Rec. S11671-72 (daily ed. Aug. 26, 1980) (remarks of Sen Durenberger). Plaintiffs concede that the Local 705 plan does not meet the "85% rule." *See* Plaintiffs' Brief at 23 n.18. Nevertheless, they argue that they "cannot be completely certain" that the exemption does not apply to them. *Id.* at 36. Such uncertainty, however, in view of the available

opportunities for clarification,[89] does not exceed that tolerated under the constitution in cases such as the present one.

The same reasoning disposes of plaintiffs' argument that the phrases "primarily engaged" and "substantial damage" are impermissibly vague. Again, the terms provide some guidance, which precludes plaintiffs from arguing that the statute is vague in all of its applications.

The second section of MPPAA challenged by plaintiffs is 29 U.S.C.A. § 1384 (Supp. 1981), the "sale of assets" provision. It provides that a withdrawal may "not occur solely because, as a result of a bona fide, arm's length sale of assets to an unrelated party," the selling employer ceases operations or contributions. *See* p. 61, *supra* [App.C 45c-46c]. Plaintiffs contend that § 1384 gives absolutely no guidance as to what constitutes a "bona fide, arm's length sale of assets." This contention is without merit.

Plaintiffs' final challenge is to 29 U.S.C.A. § 1389 (Supp. 1981), the section of MPPAA containing the De Minimis rules. *See* pp. 59-60, *supra* [App.C 44c-45c]. These rules do not apply when an employer withdraws in the same year that "substantially all" employers withdraw. 29 U.S.C.A. § 1389(c)(1) (Supp. 1981). It is similarly inapplicable when an employer withdraws pursuant to an agreement by which "substantially all" employers withdraw. *Id.* at § 1389(c)(2). Plaintiffs challenge the term "substantially all," but this challenge fails for the same reasons discussed above with reference to the trucking exemption.

In sum, plaintiffs have failed to sustain their burden of showing that the statute provides no guidance and is impermissibly vague in all of its applications. Plaintiffs' motion for summary judgment on the ground of vagueness is denied.

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[89] The PBGC has promised that "[w]here clarification of congressional language is vital it will be forthcoming." PBGC Brief at 60; *see* 29 U.S.C.A. § 1302(b) (3) (Supp. 1981).

## IX. RIGHT TO A JURY TRIAL

MPPAA provides that disputes between an employer and the plan sponsor concerning withdrawal liability shall be resolved through arbitration. 29 U.S.C.A. § 1401 (Supp. 1981). Plaintiffs assert that this mandatory arbitration requirement violates the seventh amendment right to a jury trial. They seek to distinguish the leading case in this area, *Atlas Roofing Co.* v. *OSHA,* 430 U.S. 442 (1977), by arguing that MPPAA did not create a new "public rights."

In *Atlas Roofing,* the Supreme Court held that the seventh amendment did not prevent Congress from assigning to an administrative agency the task of adjudicating violations of the Occupational Safety and Health Act. The court reasoned that such congressional delegation is permissible in cases involving "public rights":

> Our prior cases support administrative fact-finding in only those situations involving "public rights," *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases as well [sic] are not at all implicated.

*Id.* at 458. Plaintiffs argue that MPPAA does not create "public rights" because the liabilities that it imposes are enforceable not by the Government but by the trustees of the private multiemployer plans.

Plaintiffs give too narrow an interpretation to the term "public rights." In *N.L.R.B.* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937), the Supreme Court held that delgation [sic] of the fact finding function to an administrative tribunal under the National Labor Relations Act did not violate the seventh amendment, even though the subject matter of the dispute to be adjudicated was the discharge of certain employees allegedly for union activity—arguably a private dispute—and even

though the administrative proceedings were initiated by the union—a private as opposed to governmental entity. In finding no right to a jury trial in that case, the Supreme Court reasoned:

> The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit. *Id.* at 48-49.

In *Crowell* v. *Benson*, 285 U.S. 22 (1932), cited in *Atlas Roofing* with reference to the private-public dichotomy,[90] the Court stated:

> [T]he distinction is at once apparent between cases of private rights and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. . . . Familiar illustrations of administrative agencies created for the determination of [public rights] are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.
>
> The present case [a seaman's injury case] does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined." *Id.* at 50-51.

In the instant case, the liability at issue is noncontractual; it is imposed by law, and though the law obligates the trustees to initiate enforcement of the liability, the benefits do not run from one private individual to another. The liability imposed incurs in the first instance to the numerous beneficiaries of the plan and ultimately to the fiscal integrity of the PBGC, a government

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[90] *See Atlas Roofing Co.* v. *OSHA*, *supra*, 430 U.S. at 450 n. 7.

corporation. Given these circumstances, the court concludes that MPPAA seeks to protect public interests and therefore the seventh amendment is inapplicable. *Cf. Republic Industries, Inc.* v. *Central Pennsylvania Teamsters Pension Fund,* No. 82-0146, slip op. at 21 (E.D. Pa. March 22, 1982) (seventh amendment extends only to suits for claims that existed at common law and initial resort to nonjudicial form for adjudication of statutory rights under MPPAA does not offend the amendment).

## X. ORDER

For the reasons stated in this opinion, plaintiffs' motion for summary judgment is denied, and the PBGC's cross-motion for summary judgment is granted in its entirety. The case is dismissed.

/s/ Susan Getzendanner
Susan Getzendanner
*United States District Judge*

Dated: May 14, 1982

Name of Presiding Judge, Honorable Susan Getzendanner

Cause No.: 81 C 1911 Date: May 14, 1982

Title of Cause: Louis F. Peick, et al v. Pension Benefit Guaranty Corp., et al

Brief Statement of Motion: ______

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel: ______

Representing: ______

Names and Addresses of other counsel entitled to notice and names of parties they represent: ______

Reserve space below for notations by minute clerk

Plaintiffs' motion for summary judgment is denied, and the PBGC's cross-motion for summary judgment is granted in its entirety. The case is dismissed. (DRAFT)

Docketed May 18, 1982

Getzendanner, *J.*

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable Susan Getzendanner

Cause No.: 81 C 1911 Date: May 26, 1982

Title of Cause: Louis F. Peick, et al. vs. Pension Benefit Guaranty Corporation, et al.

Brief Statement of Motion: Plaintiffs' Motion to Amend May 14, 1982 judgment to dismiss without prejudice defendants Secretaries of Labor and Treasury

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

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Reserve space below for notations by minute clerk

Plaintiffs' motion to amend the May 14, 1982 Judgment Order to dismiss without prejudice defendants Secretaries of Labor and Treasury is granted.

Docketed May 27, 1982

Getzendanner, *J.*

# APPENDIX D

*Litigation Attacking the Constitutionality of MPPAA*

*A. Soloff & Son, Inc.* v. *Jerry Asher, et al., and Trustees of the Amalgamated Cotton Garment and Allied Industries Pension Fund*, C.A. No. 82 Civ. 1981 (Z) (S.D.N.Y.)

*Allan C. Ells* v. *The Construction Laborers Pension Trust for Southern California*, C.A. No. 81-4910-TJH (Gx) (C.D. Calif.) (Hatter, J.) (filed 10/29/81)

**American Trucking Associations, Inc., et al.* v. *PBGC, et al.*, C.A. No. J82-0061 (R) (S.D. Miss., Jackson Div.) (Russell, J.) (filed 2/4/82)

*Arnold's, Inc., et al.* v. *Retail Store Employees Unions AFL-CIO and Drug and Mercantile Employers Joint Pension Fund*, C.A. No. 8270734 (E.D. Mich., S.D.) (Boyle, J.) (filed 3/2/82)

**Aronson Tire Co., Inc.* v. *Vincent Pisano, et al. and PBGC*, C.A. No. 81-2554-C (D. Mass.) (Caffrey, C.J.) (Served 10/28/81)

*Arrow Transportation* v. *New England Teamsters*, C.A. No. 81-2703-S (D. Mass.) (Skinner, J.)

*Arrow Transportation* v. *Local 707 Road Carriers Welfare and Pension Fund*, C.A. No. 82-CV-0360 (E.D.N.Y.) (Bramwell, J.)

*Auclair Transportation, Inc.* v. *New England Teamsters*, C.A. No. C-81-546-L (D.N.H.) (filed 10/30/81)

*Automotive Spring Corp., et al.* v. *National Industrial Group Pension Plan*, C.A. No. 81-2921 (D.N.J.) (Meanor, J.) (filed 9/15/81)

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* Cases in which PBGC is a party.

*Avnet, Inc.* v. *Appleton, et al.*, C.A. No. 82 Civ. 1119 (S.D.N.Y.) (Conner, J.) (filed 2/24/82)

*Avnet* v. *Central States, Southeast and Southwest Areas Pension Trust*, C.A. No. 81-C-6132 (N.D. Ill. E.D.) (Aspen, J.) (filed October 30, 1981)

*Bakersfield Concrete Construction, Inc., et al.* v. *Construction Laborers Pension Trust for Southern California*, C.A. No. 82-0044-WPG (C.D. Calif.) (Gray, J.) (filed 1/6/82)

*Baldwin, et al.* v. *The Lincoln National Life Insurance Co.*, C.A. No. 82-45-NW (E.D. Va., Newport News Div.)

*Baldwin, et al.* v. *Shopmen's Ironworkers Pension Trust of Southern California*, C.A. No. CV 81-5082 LTL (Mx) (C.D. Calif.) (Lydick, J.) (filed 9/30/81)

**Bangor Punta Corporation, et al.* v. *Pisano, et al. and PBGC*, C.A. No. 81-1688 Z (D. Mass.) (Zobel, J.)

*Brooke Bond Foods, Inc.* v. *John Cook, et al.*, C.A. No. 81 Civ. 6077 (S.D.N.Y.) (Owen, J.)

*C & S Wholesale Grocers, Inc.* v. *New England Teamsters and Trucking Industry Pension Fund*, C.A. No. ——— (D.Vt.) (filed 12/2/81)

*Calvert & Youngblood Coal Co., Inc.* v. *UMWA 1950 Pension Trust, et al.*, C.A. No. CV-82-P-1070-S (N.D. Ala., S.D.) (Pointer, J.) (filed 5/12/82)

*Cenco, Inc.* v. *Central States, Southeast and Southwest Areas Pension Fund*, C.A. No. 82-C-1867 (N.D. Ill., E.D.) (Leighton, J.) (filed 3/25/82)

*Classic Chemical, Inc.* v. *International Association of Machinists*, C.A. No. 382-0241F (N.D. Tex., Dallas Div.) (Porter, J.)

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* Cases in which PBGC is a party.

*Cleveland Metal Products Co., Inc.* v. *Teamster Local No. 507 Pension Fund, et al.*, C.A. No. C81-2543 (N.D. Ohio, E.D.) (Manos, J.) (filed 12/21/81)

**Connolly, et al.* v. *PBGC*, C.A. No. 75-2037 DWW (C.D. Calif.) (Williams, J.) (amended complaint filed 8/19/82)

*Coronet Dodge, Inc.* v. *Fred R. Speckmann, et al.*, C.A. No. 81-0724C (E.D. Mo.) (Filippine, J.) (filed 6/18/81)

*Coronet Dodge, Inc.* v. *Loran W. Robbins, et al.*, C.A. No. 82-0114-C(2) (E.D. Mo., E.D.) (Filippine, J.)

*Cott Corporation* v. *New England Teamsters and Trucking Industry Pension Fund*, Bky. No. 2-80-00657 (D. Conn., Bky. Ct.)

*D.J. Drywall, Inc.* v. *Orange Belt Painters Pension Fund*, C.A. No. 81-5330-RJK (Gx) (C.D. Calif.) (Kelleher, J.) (filed 10/14/81)

*Dealers Transport Company* v. *Robbins, et al.*, Bky. No. 80-21350 Adversary No. 81-1632 (Bky. Ct. W.D. Tenn.) (Third party complaint filed 2/3/81)

*Dorn's Transportation, Inc., et al.* v. *Trucking Employees of North Jersey Welfare Fund, Inc.—Pension Account*, C.A. No. 82-122 (HCM) (D. N.J.) (Meanor, J.) (filed 1/15/82)

*E.E. Black, Ltd, et al.* v. *Hawaii Carpenters Pension Fund*, C.A. No. 82-0045 (D. Hawaii) (filed 1/26/82)

*Eberhard Foods, Inc.* v. *Retail Store Employees Union AFL/CIO and Food Employees Joint Pension Fund, et al.*, C.A. No. G 82 23 CA1 (W.D. Mich. S.D.) (filed 1/15/82) (Gibson, J.)

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* Cases in which PBGC is a party.

*Ex-Cell Home Fashions* v. *ILGWU*, C.A. No. 81-4847 (S.D.N.Y.) (Owen, J.) (filed 12/16/81)

*F. H. Cobb Company, et al.* v. *New York State Teamsters Conference Pension and Retirement Fund, et al.*, Civil Action No. 82-W-765 (N.D.N.Y.) (served July 21, 1982) (————, J.)

*First Interstate Bank of California* v. *I.A.M. National Pension Fund*, C.A. No. C 82 0753 WHO (N.D. Calif.) (Orrick, J.) (filed 2/23/82)

*Fisher Foods, Inc.* v. *Amalgamated Food and Allied Workers District Union No. 430 Pension Fund*, C.A. No. ——— (S.D. Ohio W.D.)

*Fisher Foods, Inc.* v. *The Ohio Meatpackers, Meat Cutters and Butcher Workmen Pension Plan and Trust*, C.A. No. C 82-1419 (N.D. Ohio, E.D. at Cleveland) (Lambros, J.) (filed May 28, 1982)

*Flowers Industries, Inc., et al.* v. *Bakery and Confectionery Union and Industry International Pension Fund*, C.A. No. ——— (N.D. Ga., Atlanta D.) (filed June 30, 1982)

*4-D Builders Supply* v. *Central States, Southeast and Southwest Areas Pension Trust*, C.A. No. 81-10211 (E.D. Mich.) (Harvey, J.) (filed 11/2/81)

*Frito-Lay, Inc.* v. *New England Teamsters and Trucking Industry Pension Fund*, C.A. No. 82-1780-Ma (D. Mass.) (Mazzone, J.) (filed 6/24/82)

**Fritz A. Nachant, Inc.* v. *Operating Engineers Pension Trust and PBGC*, C.A. No. 82-0373 (S.D. Calif.) (Thompson, J.) (amended complaint filed 6/7/82)

**Fox & Ginn, Inc.* v. *Pisano, et al. and PBGC*, C.A. No. 82-1078-K (D. Mass.) (Keeton, J.) (filed 4/26/82)

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* Cases in which PBGC is a party.

**G & R Roofing Co.* v. *Carpenters Pension Trust*, C.A. No. 81-5551 CBM (C.D. Calif.) (Hill, J.) (filed 10/27/81)

*Gangi Construction, et al.* v. *Operating Engineers Pension Trust for Southern California*, C.A. No. 80-0043-JRK (Px) (C.D. Calif.) (Kelleher, J.) (filed 1/27/82)

*General Oil Co., et al.* v. *New England Teamsters*, C.A. No. 81-2821-N (D. Mass.) (Nelson, J.) (filed 11/14/81)

*Gilmore Steel Corp.* v. *Western Conference of Teamsters Pension Fund*, C.A. No. C 82-3993 (N.D. Calif.) (filed July 29, 1982)

*Grano Steel Corp.* v. *Shopmen's Ironworkers*, C.A. No. CV 81-5862 LEW (JRx) (C.D. Calif.) (First amended complaint filed 11/25/81) (Waters, J.)

*H.M. Gammon Manufacturing Corp.* v. *Trustees of Amalgamated Insurance Fund*, C.A. No. ———— (S.D.N.Y.)

*Hertz Corp.* v. *The Commission Salesmen, Drivers and Helpers Union Local 187 Pension Fund*, C.A. No. 81-5034 (E.D. Pa.) (Fullam, J.)

**Intercity Transportation, Inc.* v. *PBGC, et al.*, C.A. No. 82-0256 (D. Mass.) (Keeton, J.) (filed 2/1/82)

*International Multifoods Corp.* v. *Central States, Southeast and Southwest Areas Pension Fund*, C.A. No. 81 C 6927 (N.D. Ill., E.D.) (McGarr, J.) (filed 12/11/81)

*Interstate United Corporation of Michigan* v. *Council 30, etc.*, C.A. No. 81-74664 (E.D. Mich., S.D.) (DeMascio, J.) (filed 12/15/81)

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* Cases in which PBGC is a party.

*Johnson Motor Lines, et al.* v. *Central States, Southeast and Southwest Areas Pension Fund, et al.*, C.A. No. 81 C 3703 (N.D. Ill. E.D.) (Hart, J.)

*Johnson Motor Lines, et al.* v. *Trucking Employees of North Jersey Local 560 Pension Fund*, C.A. No. 81-2344 (D.N.J.) (Meanor, J.)

**Jos. Schlitz Brewing Co.* v. *PBGC, et al.*, C.A. No. 82-C-0340 (E.D. Wis.) (Warren, J.) (filed March 19, 1982)

*1219 K.H. Mens Wear, Inc., d/b/a Neil's* v. *Trustees of the Amalgamated Insurance Fund*, C.A. No. 82-1742 (S.D.N.Y.)

*Keith Fulton & Sons* v. *New England Teamsters and Trucking Industry Pension Fund*, C.A. No. 81-2378-S (D. Mass.) (Skinner, J.) (filed 10/27/81)

*Kraft, Inc.* v. *Edward J. Malone, et al.*, C.A. No. 81-930C(A) (E.D. Mo. E.D.) (Harper, J.) (filed 9/4/81)

*Lawrence Motor Lines, Inc.* v. *New England Teamsters and Trucking Industry Pension Fund*, C.A. No. 81-3327-Ma (D. Mass.) (Mazzone, J.) (filed 12/31/81)

*Lewis & Coker Super Markets, Inc.* v. *United Food & Commercial Workers International Union—Industry Pension Fund*, C.A. No. CA3-2071H (N.D. Tex., Dallas Div.) (Barefoot Sanders, J.) (filed 11/22/81)

*Lloyds Acceptance Corp.* v. *Amalgamated Food & Allied Workers District Union No. 430 Pension Plan*, C.A. No. C-3-82-169 (S.D. Ohio, W.D.)

*MacMillan, Inc.* v. *Amalgamated Insurance Fund*, C.A. No. 81-CIV-6610 (S.D.N.Y.) (Brieant, J.) (filed 10/28/81)

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* Cases in which PBGC is a party.

*Malcolm Boring Co., Inc.* v. *Operating Engineers Pension Trust,* C.A. No. 81-6046-TJH (Kx) (C.D. Calif.) (Hatter, J.) (filed 11/27/81)

**Manning Bros. Rock & Sand Co.* v. *PBGC, et al.*, C.A. No. CV-81-6123 RMT (Tx) (C.D. Calif.) (Takasugi, J.) (filed 12/3/81)

**Merit Clothing Co., Inc.* v. *PBGC, et al.*, C.A. No. 82-0005 (W.D. Ky., Paducah Div.) (Johnstone, J.) (filed 1/21/82)

**Metropolitan Distributors, Inc., et al.* v. *Central States, Southeast and Southwest Areas Pension Fund, et al. and PBGC,* C.A. No. 82 C 4306 (N.D., Ill., E.D.) (filed July 12, 1982) (Moran, J.)

*Motorways Leasing, Inc.* v. *Central States, Southeast and Southwest Areas Pension Fund, et al.*, C.A. No. 8270630 (E.D. Mich. S.D.) (Freeman, J.) (filed 2/22/82)

*Mr. Pleat, et al.* v. *ILGWU National Retirement Fund,* C.A. No. 82 1622 AAH (C.D. Calif.) (Hauk, J.) (filed 4/1/82)

**Municipal Engineers, Inc.* v. *Operating Engineers Pension Trust and PBGC,* C.A. No. 82-0372 (S.D. Calif.) (Nielsen, J.) (amended complaint filed 6/7/82)

*National Tea Packing Co., Inc.* v. *Retail, Wholesale & Department Store International Union and Industry Pension Fund, et al.*, C.A. No. CV 82-1365 (E.D.N.Y.) (Platt, J.) (filed 5/18/82)

*Ozark Empire Distributors, Inc.* v. *Bakery & Confectionary Union and Industry International Pension Fund,* C.A. No. 82-5031 (W.D. Ark.) (filed 2/12/82)

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* Cases in which PBGC is a party.

*Pacific Iron & Metal Company* v. *Western Conference of Teamsters Pension Trust Fund*, C.A. No. C82-653 (W.D. Wash., Seattle Div.) (filed 5/27/82)

**Peick, et al.* v. *PBGC, et al.*, C.A. No. 81 C 1911 (N.D. Ill. E.D.) (Getzendanner, J.)

**Penfield & Smith Engineers, Inc.* v. *Operating Engineers Pension Trust and PBGC*, C.A. No. 82-0371 (S.D. Calif.) (Keep, J.) (amended complaint filed 6/7/82)

*Penn Elastic Company* v. *United Retail and Wholesale Employees Union, Local 115 Joint Pension Fund*, C.A. No. 82-0777 (E.D. Pa.) (Van Artsdalen, J.) (filed 2/19/82)

*Pershing Industries, et al.* v. *Trustees of the Cotton Garment & Allied Industries Pension Fund*, No. 81-CIV-7469-ES (S.D.N.Y.) (Stewart J.)

*Product Miniature Company, Inc.* v. *I.A.M. National Pension Fund*, C.A. No. 82-C-0136 (E.D. Wis.) (Reynolds, C.J.) (filed 2/10/82)

*PYA/Monarch, Inc.* v. *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund, et al.*, C.A. No. 81 C 5491 (N.D. Ill. E.D.) (Flaum, J.) (filed 10/1/81)

**R.A. Gray & Co.* v. *Oregon-Washington Carpenters-Employers Pension Trust Fund and PBGC*, C.A. No. 81-912 (D. Ore.) (Redden, J.)

*RCB Construction, Inc., et al.* v. *Silver, et al.*, C.A. No. CV-81-5350 RJK P(x) (C.D. Calif.) (Kelleher, J.) (first amended complaint filed 10/27/81)

**R.T. Curtis, Inc.* v. *Pisano, et al. and PBGC*, C.A. No. 82-1130-Z (D. Mass.) (Zobel, J.) (filed 4/29/82)

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* Cases in which PBGC is a party.

*Republic Industries, Inc.* v. *Central Pennsylvania Teamsters Pension Fund*, C.A. No. 82-0146 (E.D. Pa.) (Troutman, J.)

*Republic Industries, Inc.* v. *New England Teamsters and Trucking Industry Pension Fund*, C.A. No. 81-2551-S (D. Mass.) (Skinner, J.)

*Rhode Island Welding Supply Co., Inc.* v. *New England Teamsters & Trucking Industry Pension Fund*, C.A. No. 82-0041-G (D. Mass.) (Garrity, J.) (filed 1/27/82)

**Robbins, et al.* v. *PBGC*, C.A. No. 79 C 2601 (N.D. Ill. E.D.) (McGarr, C.J.)

*Robert Fawcett & Son Company, Inc.* v. *New England Teamsters and Trucking Industry Pension Fund*, C.A. No. 81-3134-G (D. Mass.) (Garrity, J.) (filed 12/23/81)

*Robertson's Linen Service* v. *Central States, Southeast and Southwest Areas Pension Trust*, C.A. No. 81-74350 (E.D. Mich.) (Cook, J.)

*Rockford Drop Forge Co.* v. *International Association of Machinists National Pension Fund*, C.A. No. 81 C. 5774 (N.D. Ill. E.D.) (Aspen, J.) (filed 10/15/81)

**Roy L. Klema Engineers, Inc.* v. *Operating Engineers Pension Trust and PBGC*, C.A. No. 82-0370 (S.D. Calif.) (Turrentine, J.) (amended complaint filed 6/7/82)

*S & M Paving, Inc.* v. *The Construction Laborers Pension Trust for Southern California*, C.A. No. CV-81-5929 Kn P(x) (C.D. Calif.) (Hatter, J.) (filed 11/19/81)

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* Cases in which PBGC is a party.

*Salem Laundry Co.* v. *New England Teamsters and Trucking Industry Pension Fund*, C.A. No. 81-3160-G (D. Mass.) (Garrity, J.)

**San Diego Gas & Electric Co.* v. *Western Conference of Teamsters Pension Trust Fund and PBGC*, C.A. No. 82-0459-GT (S.D. Calif.) (Thompson, J.) (filed 5/5/82)

*Sands, Taylor, Wood & Co.* v. *Grady*, C.A. No. 82-0726 (D. Mass.) (Nelson, J.) (filed 3/16/82)

**Shelter Framing Corporation* v. *Carpenters Pension Trust for Southern California*, C.A. No. 81-4457 (C.D. Calif.) (Hill, J.)

*Shull Truck Line Company, Inc.* v. *Central States, Southeast, and Southwest Areas Pension Fund*, C.A. No. 81-1184 (W.D. Tenn.) (Wellford, J.) (filed 11/17/81)

*Sibley, Lindsay & Curr Co.* v. *Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO, et al.*, Civil Action No. 82-555 T (W.D. N.Y.) (filed June —, 1982)

**Sierra Pacific Industries* v. *The Lumber Industry Pension Fund & PBGC, et al.*, C.A. No. CIV S-82-459 LKK (E.D. Calif.) (Karlton, J.) (filed 6/7/82)

*Specialty Paper Box Co.* v. *The Paper Industry Union-Management Pension Fund*, C.A. No. 82-2945-KH (NCx)) (C.D. Calif.) (filed 6/11/82)

*Fred R. Speckmann, et al.* v. *Barford Chevrolet Company*, C.A. No. 81-0795(C) (E.D. Mo.) (Meredith, J.) (filed 7/7/81)

*Fred R. Speckmann, et al.* v. *Suburban Ford Sales, Inc.*, No. 81-891 C (2) (E.D. Mo.) (Nangle, J.)

*Stoeven Brothers* v. *California Butchers Pension Trust Fund*, C.A. No. C-82-0558 (RFP) (N.D. Calif.) (Peckham, C.J.) (filed 2/4/82)

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* Cases in which PBGC is a party.

*Stop & Shop Companies, Inc.* v. *Local 464A Pension Fund*, C.A. No. 81-4028 (D.N.J.) (Meanor, J.) (filed 12/30/81)

*Tanney's Motor Transportation, Inc.* v. *New York State Teamsters Conference Pension and Retirement Fund, et al.*, C.A. No. ——— (N.D.N.Y.)

*Teamsters Joint Council No. 83 of Virginia Pension Fund, et al.* v. *The Davidson Transfer and Storage Co.*, C.A. No. 81-1007-R (E.D. Va., Richmond Div.) (filed November 13, 1981)

*The Hunter Corporation* v. *New England Teamsters and Trucking Industry Pension Fund*, C.A. No. B-82-325 (D. Conn.) (filed 6/3/82)

**The TJM Corporation, et al.* v. *Board of Trustees, Paper Converters—Local 286 Pension Plan and PBGC*, C.A. No. 82-2435, Sec. L., Mag. 5 (E.D. La.)

**The Terson Company, Inc.* v. *PBGC, et al.*, C.A. No. 81 C 4176 (N.D. Ill. E.D.) (McGarr, C.J.)

*The Washington Star Co.* v. *International Typographical Union Negotiated Pension Plan*, C.A. No. 82-1568 (D.D.C.) (Green, J.) (filed June 8, 1982)

*Transport Motor Express, Inc., et al.* v. *Central States, Southeast and Southwest Areas Pension Fund, et al.*, C.A. No. 81 C 4535 (N.D. Ill. E.D.) (Flaum, J.) (filed 8/10/81

*UFCW International Union-Industry Pension Fund and John E. Boyd* v. *The Schear Group. Inc., et al.*, C.A. No. ——— (S.D. Ohio, W.D.) (filed January —, 1982)

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* Cases in which PBGC is a party.

*UFCW Unions and Food Employers Pension Plan of Central Ohio and Kenneth V. Mitchell* v. *The Schear Group, Inc., et al.*, C.A. No. C-3-81-439 (S.D. Ohio, W.D.) (Rice, J.) (filed November —, 1981)

*United Engine & Machine Co., Inc.* v. *International Association of Machinists and Aerospace Workers AFL-CIO, National Pension Fund*, C.A. No. C 82 2032 TEH (N.D. Calif.) (Henderson, J.) filed 5/5/82)

*Universal Sewer Pipe Company* v. *United Brick and Clay Workers of America, AFL-CIO, District Council #9 Pension Fund*, C.A. No. 2-82-55 (S.D. Ohio, E.D.) (filed 1/15/82)

*Vesci, Inc.* v. *Central States, Southeast and Southwest Areas Pension Fund*, C.A. No. 81-7286 (N.D. Ill. E.D.) (Kocoras, J.) (filed 12/30/81)

**Victor Construction Co.* v. *The Construction Laborers Pension Trust for Southern California*, C.A. No. 81-5144-TJH (Gx) (C.D. Calif.) (Hall, J.) (filed 10/29/81)

*Warner-Lambert Co., Inc.* v. *United Retail and Wholesale Employees' Teamster Local No. 115 Pension Fund*, C.A. No. 82-1080 (E.D. Pa.) (Van Artsdalen, J.) (filed 3/10/82)

*Winn-Dixie Stores, Inc.* v. *UFCW International Union-Industry Pension Fund*, C.A. No. 82-491-Civ-J-JHM (M.D. Fla., Jacksonville Div.)

*Witte Transportation Co., et al.* v. *Central States, Southeast and Southwest Areas Pension Fund, et al.*, C.A. No. 4-81-472 (D. Minn.) (Lord, J.)

*Woodward Sand Co., Inc.* v. *Operating Engineers Pension Trust*, C.A. No. 81-920-N(I) (S.D. Calif.) (Nielsen, J.) (filed 9/23/81)

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* Cases in which PBGC is a party.

# APPENDIX E

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## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. Article I of the Constitution of the United States provides as relevant:

> Section 10. No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .

2. Amendment V to the Constitution of the United States provides as relevant:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Sections 4201-4203 of the Multiemployer Pension Plan Amendments Act of 1980, 29 USC §§ 1381-1383 (Supp.V), provide as relevant:

**§ 1381. Withdrawal liability established; criteria and definitions**

**(a)** If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

**(b)** For purposes of subsection (a) of this section—

(1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted—

(A) first, by any de minimis reduction applicable under section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

(2) The term "complete withdrawal" means a complete withdrawal described in section 1383 of this title.

(3) The term "partial withdrawal" means a partial withdrawal described in section 1385 of this title.

**§ 1382. Determination and collection of liability; notification of employer**

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall—

**(1)** determine the amount of the employer's withdrawal liability,

**(2)** notify the employer of the amount of the withdrawal liability, and

**(3)** collect the amount of the withdrawal liability from the employer.

**§ 1383. Complete withdrawal**

**(a) Determinative factors**

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

**(1)** permanently ceases to have an obligation to contribute under the plan, or

**(2)** permanently ceases all covered operations under the plan.

**(b) Building and construction industry**

(1) Not withstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if—

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan—

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if—

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer—

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

**(c) Entertainment industry**

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the entertainment industry, primarily on a temporary or project-by-project basis, if the plan primarily covers employees in the entertainment industry, a complete withdrawal occurs only as described in subsection (b)(2) of this section applied by substituting "plan" for "collective bargaining agreement" in subparagraph (B)(i) thereof.

(2) For purposes of this subsection, the term "entertainment industry" means—

(A) theater, motion picture (except to the extent provided in regulations prescribed by the corporation), radio, television, sound or visual recording, music, and dance, and

(B) such other entertainment activities as the corporation may determine to be appropriate.

(3) The corporation may by regulation exclude a group or class of employers described in the preceding sentence from the application of this subsection if the corporation determines that such exclusion is necessary—

(A) to protect the interest of the plan's participants and beneficiaries, or

(B) to prevent a significant risk of loss to the corporation with respect to the plan.

(4) A plan may be amended to provide that this subsection shall not apply to a group or class of employers under the plan.

**(d) Other determinative factors**

(1) Notwithstanding subsection (a) of this section, in the case of an employer who—

**(A)** has an obligation to contribute under a plan described in paragraph (2) primarily for work described in such paragraph, and

**(B)** does not continue to perform work within the jurisdiction of the plan, a complete withdrawal occurs only as described in paragraph (3).

**(2)** A plan is described in this paragraph if substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry.

**(3)** A withdrawal occurs under this paragraph if—

**(A)** an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and

**(B)** either—

**(i)** the corporation determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or

**(ii)** the employer fails to furnish a bond issued by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to 50 percent of the withdrawal liability of the employer.

**(4)** If, after an employer furnishes a bond or escrow to a plan under paragraph (3)(B)(ii), the corporation determines that the cessation of the employer's obligation to contribute under the plan (considered together with any

cessations by other employers), or cessation of covered operations under the plan, has resulted in substantial damage to the contribution base of the plan, the employer shall be treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased, and such bond or escrow shall be paid to the plan. The corporation shall not make a determination under this paragraph more than 60 months after the date on which such obligation to contribute or covered operations ceased.

(5) If the corporation determines that the employer has no further liability under the plan either—

(A) because it determines that the contribution base of the plan has not suffered substantial damage as a result of the cessation of the employer's obligation to contribute or cessation of covered operations (considered together with any cessation of contribution obligation, or of covered operations, with respect to other employers), or

(B) because it may not make a determination under paragraph (4) because of the last sentence thereof,

then the bond shall be cancelled or the escrow refunded.

(6) Nothing in this subsection shall be construed as a limitation on the amount of the withdrawal liability of any employer.

**(e) Date of complete withdrawal**

For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

**(f) Special liability withdrawal rules for industries other than construction and entertainment industries; procedures applicable to amend plans**

(1) The corporation may prescribe regulations under which plans in industries other than the construction or entertainment industries may be amended to provide for special withdrawal liability rules similar to the rules described in subsections (b) and (c) of this section.

(2) Regulations under paragraph (1) shall permit use of special withdrawal liability rules—

(A) only in industries (or portions thereof) in which, as determined by the corporation, the characteristics that would make use of such rules appropriate are clearly shown, and

(B) only if the corporation determines, in each instance in which special withdrawal liability rules are permitted, that use of such rules will not pose a significant risk to the corporation under this subchapter.